

No. 11736

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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E. ROYCE, B. ROYCE and A. H. WENCK, doing  
business as Gray Line Tours,

Appellants.

vs.

CLARK SQUIRE, Collector of Internal Revenue  
for the District of Washington,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED  
NOV 12 1947

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

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In the District Court of the United States  
for the District of Washington

No. 876

E. ROYCE, B. ROYCE and A. H. WENCK,  
d/b/a Gray Line Tours,  
Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of In-  
ternal Revenue for the District of Washington,  
Defendant.

### COMPLAINT

Come now the Plaintiffs and for cause of action  
against the above named Defendant, allege as fol-  
lows:

#### I.

That at all times herein mention: Plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; Plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County Washington,, and Plaintiff A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and Plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business at Seattle, Washington.

#### II.

That at all times herein mentioned, Defendant was, and now is, United States Collector of Internal

Revenue for the District of Washington, stationed at Tacoma, Washington.

### III.

Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 USCA Subdivision (a) and the provisions of Section 322.

### IV.

That during the period from October 1, 1941 to September 30, 1944, Defendant assessed to Plaintiffs and Plaintiffs paid to the Defendant, Transportation Taxes in the total amount of \$16,423.51, said taxes being upon passengers transported in motor vehicles having a seating capacity of less than ten (10) adult passengers including the driver thereof, and which said vehicles were not operated on an established line.

### V.

That the said taxes were illegally assessed and collected by the Defendant herein, by reason of the fact that the provisions of the United States Revenue Acts specifically exempt charges for transportation in the manner and under the conditions under which the motor vehicles of Plaintiffs' were operated, and Defendant now illegally withholds from Plaintiffs the said taxes thus illegally collected, although demand for the refund thereof has been made upon him.

## VI.

That on the 30th day of November, 1944, Plaintiffs filed and lodged with the Defendant herein a Claim properly and duly prepared and executed upon the form in such cases provided, for the refund of said \$16,423.61, together with interest as provided by law.

## VII.

That on the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said Claim for Refund.

Wherefore, Plaintiffs pray for judgment against the Defendant in the principal sum of \$16,423.51, together with interest as provided by law from the respective dates of payments of said taxes, together with their costs and disbursements incurred herein.

April 18th, 1946.

/s/ ROBT. T. JACOB,

Counsel for Plaintiffs,

917 Public Service Bldg.

Portland 4, Oregon.

/s/ JOSEPH E. GANDY.

[Endorsed]: Filed April 2, 1946.



[Title of District Court and Cause.]

### ORDER

It appearing that through error the above entitled cause was filed in the Northern Division of the District Court of the United States for the Western District of Washington, and it further appearing that the defendant above named, "Clark Squire, United States Collector of Internal Revenue for the District of Washington," is a resident of The Southern Division of the District Court of the United States for the Western District of Washington, as shown by Paragraph 2 of the complaint filed in this cause, and that said proceeding should have been filed in said Southern Division, and the Court being fully advised in the premises,

It Is Hereby Ordered that the above entitled cause be and the same hereby is transferred from the Northern Division of the District Court of the United States for the Western District of Washington to the Southern Division of the District Court for the Western District of Washington, and the Clerk of this Court is hereby directed to forward all of the pleadings filed in said cause to the Clerk of the District Court of the United States, Western District of Washington, Southern Division, at Tacoma.

Done in Open Court this 24th day of April, 1946.  
Presented by: JOHN C. BOWEN,

United States District Judge.

JOSEPH E. GANDY,

Attorney for Plaintiffs.

[Endorsed]: Filed April 24, 1946.

[Title of District Court and Cause.]

## ANSWER

Defendant answers, by paragraph numbers corresponding to paragraph numbers of the complaint, as follows:

I.

Admitted.

II.

Admitted.

III.

Admitted.

IV.

Denied, except admits that there was assessed and paid to the defendant by the plaintiffs a transportation tax in the amount of \$16,423.51.

V.

Denied.

VI.

Admitted.

VII.

Admitted.

## ADDITIONAL DEFENSE

I.

Defendant, as additional defense, alleges that the complaint should be dismissed under Section 3471 of the Internal Revenue Code, since the complaint does not allege that the plaintiffs have repaid the amount of the taxes to the persons from whom they

collected such taxes or obtained the consent of such persons to the allowance of such credit or refund.

Wherefore, having fully answered, defendant prays judgment and costs.

/s/ J. CHAS. DENNIS,  
United States Attorney.

/s/ HARRY SAGER,  
Assistant United States  
Attorney.

/s/ THOMAS R. WINTER,  
Special Assistant to the Chief Counsel, Bureau of  
Internal Revenue.

[Endorsed]: Filed July 22, 1946.

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[Title of District Court and Cause.]

### ORDER ON PRE-TRIAL HEARING

This matter having come on regularly for pre-trial hearing before the Honorable Charles H. Leavy, United States District Judge, on the..... day of April, 1947, and the plaintiffs being represented by Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., their attorneys, and the defendant being represented by Harry Sager, Esq., and Thomas R. Winter, Esq., of his attorneys, and upon the proceedings had at said hearing, it is

Ordered that the following facts are admitted by

the parties and are accepted as established facts in this case:

1. At all times herein mentioned, plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County, Washington, and plaintiff, A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business in Seattle, Washington.

2. At all times herein mentioned, defendant was, and now is, United States Collector of Internal Revenue for the District of Washington, stationed at Tacoma, Washington.

3. Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 U.S.C.A., Subdivision (a) and the provisions of Section 322.

4. Plaintiffs, on February 28, 1942, filed with the defendant delinquent returns on tax for transportation of persons for the months of October, November and December, 1941, and timely returns for period January 1, 1942, through September 30, 1944, and paid the sums as taxes, penalties and interest in the amount of \$16,423.51, as shown by pre-trial Exhibits 1, 2 and 3.

5. On the 30th day of November, 1944, plaintiffs filed and lodged with the defendant herein a claim on proper form in such cases provided for the refund of said \$16,423.51, together with interest as provided by law.

6. On the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said claim for refund.

7. Plaintiffs and their predecessor corporation have engaged in such business since April, 1934. The principle activity in the field of local transportation since May 1, 1941, has consisted of transportation of persons. Plaintiffs about that time entered into agreements or arrangements with the United Air Lines, Northwest Airlines and Pan-American World Airways to provide limousine service. Exhibit 4 is the contract between the plaintiffs predecessors and the United Air Lines. There were no other written agreements between the plaintiffs and the air lines, except such as may be reflected in correspondence, if any.

8. Plaintiffs' limousine fleet until January 6, 1945, consisted of five seven-passenger limousines and, while plaintiffs contend it is immaterial, on that date an eleven-passenger limousine was added to the fleet, and it has been operated in the same manner as the seven-passenger limousines. Plaintiffs operated five other seven-passenger limousines for their funeral service and also a twenty-passenger bus was used in charter service to the air lines for out-of-town service only. No taxes for transporta-



tion on the eleven-passenger limousine, the limousines when used for funeral service nor the twenty-passenger bus are involved in this action. If needed, however, the cars used for funeral service were operated on the air line service and taxi cabs were hired to handle the overflow on the air line service.

9. Four of the limousines customarily used in the regular air line service were painted gray and one was painted black. On most limousines during most of the period involved, there were placed painted detachable emblems of the air line companies which were twelve inches square or round and were placed on the right front door of the limousines. These were changed on the particular limousine used showing the particular air line whose passengers were being transported to or from a scheduled air line flight. For some time, signs have been painted on the limousines, rectangular in shape, bearing the word "Air Line Service" and underneath in smaller letters the words "Gray Line Tours."

10. The air line companies did not sell or issue tickets in connection with flight passage that were good for transportation to or from airports in the plaintiffs' limousines; however, they published schedules of fares of the limousine service, as shown by pre-trial Exhibit 5.

11. Air line passengers, when purchasing tickets for a scheduled flight, were asked by employees of the air lines whether they desired limousine service or whether they would use their own transportation.

In cases where air line passengers desired such limousine service they were advised of the places of departure of passengers which were usually the offices of the air line companies, the Olympic Hotel, the New Washington Hotel and/or one or more hotels designated at the time. They were also advised of the time of the departure of the limousines from those places, which was approximately one hour prior to the air line flight. Also, approximately one hour before the plane was scheduled to leave the airport, the air line office would notify the plaintiffs' dispatcher when the flight was leaving, names of the passengers who were scheduled to use the limousine service and the places from which they were scheduled to depart. Prior to the arrival of an incoming flight, the air lines would notify the plaintiffs' dispatcher of the time of the plane's arrival. The plaintiffs would then send a limousine to the airport to transport any passengers desiring limousine service to the said metropolitan area. In case of emergency, adverse weather conditions or when Boeing Field was unavailable, plaintiffs would dispatch a bus or limousine to or from other fields, and such service was billed to the air line, the tax liability on which transportation is not herein involved.

12. Under the agreements or arrangements with the air lines, the plaintiffs were required to meet all incoming scheduled plane flights and frequently limousines were sent out to the airport, without passengers, to meet an incoming plane. If there were no incoming air line passengers using the limousine

transportation back to the metropolitan area, the limousine might wait at the airport until the arrival of the next scheduled flight or be ordered back to town by plaintiffs' dispatcher. It was sometimes necessary to order limousines back from an airport to the metropolitan area in order to transport passengers from the metropolitan area to a scheduled outgoing flight.

13. Plaintiffs' limousines never accepted passengers without being called by the air lines' office and being told whom the passengers were and the time and places where passengers were to meet the limousine for departure. While the defendant contends it is immaterial, the City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route.

14. While the defendant contends it is immaterial, all of said vehicles, including the said eleven-passenger limousine, are licensed as "for hire" vehicles under the laws of the State of Washington, as defined in Section 6312-1, et seq., Remington's Revised Statutes of Washington, and operate as "for hire" vehicles in the City of Seattle under Ordinance No. 59866, a copy of which ordinance is pre-trial Exhibit 6.



15. Prior to October 10, 1941, the plaintiffs established one-way fare was \$.75 between the designated places of departure in the metropolitan area and the Boeing Airport, and the same one-way fare was charged between the airport and the metropolitan area. On October 10, 1941, the plaintiffs started collecting \$.80 per passenger. Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, imposing a transportation tax of 5 percent, became effective on said date. The plaintiffs, starting November 1, 1942, through November 21, 1942, collected \$.84 per passenger. The tax rate was increased by Section 609 of the Revenue Act of 1942 to 10 per cent, effective on said November 1, 1942. On November 22, 1942, plaintiffs started collecting \$.85 per passenger until April 1, 1944, and on and after said date began collecting \$.90 per passenger. Section 302(a) of the Revenue Act of 1943 became effective on said April 1, 1944, and it increased the rate to 15 per cent. From October 10, 1941, to April 1, 1944, the air lines were billed by plaintiffs for \$.75 per passenger carried at the air lines' expense, plus 5 percent or 10 percent of the amount billed as a tax, depending upon the tax rate then in effect. On and after April 1, 1944, the air lines were billed by the plaintiffs for \$.78 per passenger carried at the air lines' expense, plus 15 percent of the amount billed as a transportation tax, all of which is indicated on schedule, pre-trial Exhibit 7. Pre-trial Exhibit 8 is samples of such billings for the various periods herein involved.

16. Plaintiffs furnished their drivers with new schedules of airport fares upon the effective date of each increase mentioned in paragraph 15, of which pre-trial Exhibit 9 is a sample during the period subsequent to April 1, 1944. The drivers would collect the fares existing at the time for the transportation from the passengers carried, except passengers carried at the expense of the air lines, and in cases where a passenger would ask what the fare included, a driver himself would tell the passenger it included the tax.

17. Plaintiffs' drivers turned in the cash collected with their "daily turn-in sheets" to their dispatchers who checked them and prepared a daily operating report, summarizing cash fares, tax, charge fares and tax. Plaintiffs' bookkeeper prepared "monthly summary of daily operating reports." Exhibits 10 and 11 are samples for each period of "daily turn-in sheets" and "monthly summary of daily operating reports," respectively. The cash fares and tax were then entered in the plaintiffs' cash journal. Exhibit 12 is the cash journal sheet of plaintiffs for October, 1941. The cash fares and tax are maintained as separate items and the amounts reported in the tax returns filed are the sums of the monthly total collected as taxes on cash fares and the monthly total billed to and collected from the air lines as taxes. The amounts collected as taxes in the cash journal were posted monthly to an account in the plaintiffs' general ledger entitled "Federal Transportation Tax," Ac-

count No. 2020E. Pre-trial Exhibit 13 is copies of that account in the general ledger. The taxes are shown on the plaintiffs' books as an accrued liability account and the taxes collected, aforesaid, have not been closed into the plaintiffs' profit and loss account nor reported in its income tax liability during any of the period involved.

18. All sums collected from the individual passengers and from the air lines, including the amounts billed and collected as tax, were deposited in the plaintiffs' bank account and the sums paid by plaintiffs to the defendant, as shown by said returns, were paid by checks drawn by plaintiffs on their said bank account.

### Issues

It is ordered that the following are the issues to be submitted to the Court for determination:

#### I.

Whether or not, during the period October 10, 1941, through September 30, 1944, the plaintiffs in transporting passengers in their motor vehicles, involved in this action, were operating their said vehicles "on an established line" within the meaning of Section 3469 of the Internal Revenue Code and the applicable regulations. The plaintiffs, however, reserve the privilege of contesting the validity of any such regulation.

#### II.

Whether the plaintiffs erroneously or illegally overpaid from their own funds any taxes or whether

the plaintiffs over-collected from the persons transported and overpaid said taxes to the defendant and have established a right to a refund or credit within the meaning of the statutes and regulations applicable thereto. The defendant, however, does not waive his additional defense set forth in his answer; and plaintiffs, therefore, do not waive their motion to amend, by interlineation, paragraphs IV and V of their complaint.

### III.

Whether or not the plaintiffs are entitled to a refund of the said sum of \$16,423.51, or any part thereof, paid to the defendant by the plaintiffs as aforesaid.

It is ordered that the contentions of the respective parties are as follows:

#### Contentions of Plaintiffs

##### I.

That in transporting said passengers plaintiffs were not operating their said vehicles "on an established line" within the meaning of said statutes and regulations.

##### II.

That because of the fact set forth in paragraph I of plaintiffs' contentions, the amounts of money paid as fares to the plaintiffs by said passengers were not taxable under the provisions of said statutes.

## III.

That the said amounts assessed and paid as taxes as aforesaid were assessed upon fares mentioned in paragraphs II of plaintiffs' contentions, and said payment of said amounts was made to the defendant by the plaintiffs from their own funds. Plaintiffs, when making said payments, were under the mistaken and erroneous assumption that the transportation of passengers to and from said airports in said seven-passenger limousines was subject to the tax imposed by said Section 3469, Internal Revenue Code and amendments thereto.

## IV.

That the said amounts were illegally assessed and collected as taxes by the defendant herein, by reason of the fact that the provisions of said statutes specifically exempt charges for transportation in the manner and under the conditions under which the motor vehicles of plaintiffs' were operated, and defendant now illegally withholds from plaintiffs the said amounts thus illegally collected, although demand for the refund thereof has been made upon him.

## Contentions of the Defendant

## I.

That the complaint should be dismissed under Section 3471 of the Internal Revenue Code, since the complaint does not allege that the plaintiffs have repaid the amount of the taxes to the persons from whom they collected such taxes or obtained the consent of such persons to the allowance of such credit or refund.



## II.

That the taxes, penalties and interest for which refund and judgment are claimed were paid as tax collected in connection with the amounts paid for the transportation of persons, furnished by means of motor vehicles operated on an established line, within the meaning of Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, and Section 130.58 of Regulations 42, and the said tax was, therefore, legally assessed and collected.

## III.

That the taxes, penalties and interest for which refund and judgment are claimed were not paid by the plaintiffs from their own funds but that at the precise effective dates of the Government's taxes the passenger fare charged was increased to an amount sufficiently high to include the tax; that this was done because of the effective tax becoming operative.

## IV.

That even though the plaintiffs have over-collected and over-paid the tax, they have not established that the tax so over-collected and over-paid has been returned to the person from whom collected or have obtained the written consent of such person to such refund, within the meaning of Section 3772 of the Internal Revenue Code and Section 130.78 of Regulation 42.

It Is Ordered that in support of their said contentions the parties hereto may introduce evidence of facts in addition to and in explanation of the facts hereinabove set forth.

Exhibits

It Is Ordered that the parties may offer in evidence at the trial of this action any and all of the following Pre-Trial Exhibits without further identification or authentication, but subject to any and all other objections:

Pre-Trial Exhibit 1. Plaintiffs' monthly returns on Form 727, revised 1941, for months of October, November and December, 1941.

Pre-Trial Exhibit 2. Plaintiffs' monthly returns on Form 727, revised 1941, for the period January, 1941, through September, 1944.

Pre-Trial Exhibit 3. Claim for refund and attached certificate, schedule statement and Commissioner's letter of rejection, dated May 31, 1945.

Pre-Trial Exhibit 4. Contract between United Air Lines Transport Corp. and plaintiffs' predecessor corporation, dated May 7, 1941.

Pre-Trial Exhibit 5. Time tables of Pan-American Airways, dated June-October, 1941, and March, 1945; United Air Lines, dated October 1, 1944, and March 15, 1945, and Northwest Airlines, dated March 18, 1945.

Pre-Trial Exhibit 6. City of Seattle Ordinance No. 59866.

Pre-Trial Exhibit 7. Schedule of fares and tax for periods October 10, 1941, through September, 1944.

Pre-Trial Exhibit 8. Samples of plaintiffs' billings to air lines for each period involved.

Pre-Trial Exhibit 9. Plaintiffs' schedule of airport fares furnished drivers.

Pre-Trial Exhibit 10. Drivers' daily turn-in sheets.

Pre-Trial Exhibit 11. Copies for each period of "daily" and "monthly summary of daily operating reports."

Pre-Trial Exhibit 12. Plaintiffs' Cash Journal sheet for October, 1941.

Pre-Trial Exhibit 13. Plaintiffs' "Federal Transportation Account," No. 2120E.

Pre-Trial Exhibit 14. Inter-office letter of instructions United Air Lines, dated October 23, 1943.

Pre-Trial Exhibit 15. Letter dated March 8, 1945, to Gus Wenck, Manager, Gray Line Tours, from H. William Bernhardt, Assist. Traffic Manager, Pan-American Airways.

Pre-Trial Exhibit 16. Map of Seattle prepared for Seattle Chamber of Commerce.

Pre-Trial Exhibit 17. Map of City of Seattle.

\*Pre-Trial Exhibit 5 Also includes Northwest Airlines time tables dated September, 1941, December, 1941, November, 1942, and June, 1944.

It Is Ordered that further exhibits may be offered in evidence by plaintiffs or defendant at the trial, and that if an exhibit or exhibits, other than those identified herein, are offered and received in evidence the other party shall have a reasonable opportunity to submit opposing evidence before the case is closed.



The foregoing is certified to be a record of the proceedings had at the Pre-Trial of this cause, and

It Is Ordered that the issues to be tried herein shall be those hereinabove set forth.

Dated at Tacoma, Washington, this 1st day of May, 1947.

/s/ CHARLES H. LEAVY,  
U. S. Dist. Judge.

Approved:

/s/ RANDALL S. JONES,  
Attorney for Plaintiffs.

/s/ THOMAS R. WINTER,  
Attorney for Defendant.

[Endorsed]: Filed May 1, 1947.

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[Title of District Court and Cause.]

#### DOCKET ENTRIES

1946

Apr. 22—Filed Complaint (No. Div. No. 1532)

Apr. 22—Filed Praecipe—Issued Summons

Apr. 24—Filed Order (Sea.) transf. case to So. Div.

June 20—Filed Stip. allow. deft. to 7/22/46 to Ans.

June 20—Filed Order allow. deft. to 7/22/46 to Ans.

July 22—Filed Answer

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Feb. 4—Trial set for Apr. 14

Apr. 12—Filed Praecipe, deft.—Issued Subp. (2)

Apr. 14—Case called for trial; Robt. Jacob & Randall Jones allowed appear as assoc. counsel for Pltfs.; trial date passed for completion of pre-trial order

Apr. 16—Filed Ret. on Subp.

Apr. 16—(At Sea.)—Pretrial Order lodged; set for trial at Seattle Apr. 30, 2 p.m.

Apr. 22—Filed Reporter's Transcript of Proceedings (of 4/14/47)

Apr. 30—Trial passed to May 1st at Tacoma

May 1—Filed Praecipe, Pltfs.—Issued 2 Subp.—Filed Ret.

May 1—Ent. record hearing re entry Pre-Trial Order

May 1—Filed and entered Pre-Trial Order

May 1—Ent. record trial (before Court) commenced. Court orally finds for deft. and case to be dis.; written F & C & Decree later

June 4—Filed Reporter's Transcript of Proceedings (of 5/1/47)

June 16—Filed & ent. Findings of Fact and Conclusions of Law (with Exceptions attached)

June 16—Filed and ent. Judgment: Compl. dis. with prej. and with costs in favor deft.

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June 16—Filed Cost Bill, U. S. (\$2297)

June 16—Notice of entry of Judgm. sent atty, for Pltfs.

Aug. 21—Filed Transcripts of Proceedings (trial of 5/1/47) in dup.

Aug. 22—Filed Notice (Pltfs.) of Appeal—Copy del. to U. S. Atty. and Thos. R. Winter

Aug. 22—Filed Bond on Appeal

Aug. 22—Filed Statement of Pts. on which Appellants Intend to Rely

Aug. 23—Filed Designation of Contents of Record on Appeal

Aug. 25—Filed Order for transmittal of orig. exhibits to C.C.A.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 1st day of May, 1947, before the above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiffs appearing by their attorneys, Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., being represented in Court by Randall S. Jones, Esq., and defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington,

Harry Sager, Assistant United States Attorney for said District, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in Court by Thomas R. Winter, and the Court having signed and entered an order on the pre-trial hearing and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument by counsel, and the Court having rendered an oral opinion and the Court being fully advised, now makes the following

### Findings of Fact

#### I.

At all times herein mentioned, plaintiff, E. Royce, was, and still is, a resident of Portland, Multnomah County, Oregon; plaintiff, B. Royce, was, and still is, a resident of Vancouver, Clark County, Washington, and plaintiff, A. H. Wenck, was, and still is, a resident of Seattle, King County, Washington, and plaintiffs were, and still are, engaged in the business of transporting passengers in motor vehicles, under the firm name and style of "Gray Line Tours," having its principal place of business in Seattle, Washington.

#### II.

At all times herein mentioned, defendant was, and now is, United States Collector of Internal Revenue for the District of Washington, stationed at Tacoma, Washington.

## III.

Jurisdiction of the within cause rests upon the Judicial Code of the United States, Section 3469, as amended by the Revenue Act of 1943 (26 U.S.C.A., Subdivision (a)) and the provisions of Section 322.

## IV.

Plaintiffs, on February 28, 1942, filed with the defendant delinquent returns on tax for transportation of persons for the months of October, November and December, 1941, and timely returns for the period January 1, 1942, through September 30, 1944, and paid the sums as taxes, penalties and interest in the amount of \$16,423.51.

## V.

On the 30th day of November, 1944, plaintiffs filed and lodged with the defendant herein a claim on proper form in such cases provided for the refund of said \$16,423.51, together with interest as provided by law.

## VI.

On the 19th day of June, 1945, the Commissioner of Internal Revenue rejected said claim for refund.

## VII.

Plaintiffs and their predecessor corporation have engaged in such business since April, 1934. Their principle activity in the field of local transportation since May 1, 1941, has consisted of transportation

of persons. Plaintiffs' predecessor corporation, about that time, entered into a written contract or agreement, dated May 7, 1941, with the United Air Lines Transport Corporation to provide transportation service for passengers of said United Air Lines to and from the airport at Boeing Field, Seattle, Washington. Oral agreements or similar arrangements were later made with the Northwest Airlines and Pan-American World Airways. There were no subsequent or other written agreements between the plaintiffs and the airlines, and the transportation service has continued to be operated in substantially the same manner during all the period involved.

#### VIII.

Plaintiffs' limousine fleet until January 6, 1945, consisted of five seven-passenger limousines. On that date an eleven-passenger limousine was added to the fleet, and it has been operated in the same manner as the seven-passenger limousines. Plaintiffs operated five other seven-passenger limousines for their funeral service and also a twenty-passenger bus was used in charter service to the air lines for out-of-town service only. No taxes for transportation on the eleven-passenger limousine, the limousines when used for funeral service nor the twenty-passenger bus are involved in this action. If needed, however, the cars used for funeral service were operated on the air line service and taxi cabs were hired to handle the overflow on the air line service.



## IX.

Four of the limousines customarily used in the regular air line service were painted gray and one was painted black. On most limousines during most of the period involved, there were placed painted detachable emblems of the air line companies which were twelve inches square or round and were placed on the right front door of the limousines. These were changed on the particular limousine used showing the particular air line whose passengers were being transported to or from a scheduled air line flight. For sometime, signs have been painted on the limousines, rectangular in shape, bearing the words "Air Line Service" and underneath in smaller letters the words "Gray Line Tours."

## X.

The air line companies did not sell or issue tickets in connection with flight passage that were good for transportation to or from airports in the plaintiffs' limousines; however, they published schedules of fares of the limousine service.

## XI.

Air line passengers, when purchasing tickets for a scheduled flight, were asked by employees of the air lines whether they desired limousine service or whether they would use their own transportation. In cases where air line passengers desired such limousine service they were advised of the places of departure of passengers which were usually the

offices of the air line companies, the Olympic Hotel, the New Washington Hotel and/or one or more hotels designated at the time. They were also advised of the time of the departure of the limousines from those places, which was approximately one hour prior to the air line flight. Also, approximately an hour before the plane was scheduled to leave the airport, the air line office would notify the plaintiffs' dispatcher when the flight was leaving, names of the passengers who were scheduled to use the limousine service and the places from which they were scheduled to depart. Prior to the arrival of an incoming flight, the air lines would notify the plaintiffs' dispatcher of the time of the plane's arrival. The plaintiffs would then send a limousine to the airport to transport any passengers desiring limousine service to the said metropolitan area. In case of emergency, adverse weather conditions or when Boeing Field was unavailable, plaintiffs would dispatch a bus or limousine to or from other fields, and such service was billed to the air line, the tax liability on which transportation is not herein involved.

## XII.

No air line passengers were picked up in the down town district, except at points designated by the air lines and pursuant to a telephone call from the air lines. The said down town district was considered by the plaintiffs and the air lines to be that area in the City of Seattle bounded on the North by Lenora Street, on the East by Ninth



Avenue, on the South by Boeing Field, and on the West by the waterfront of Puget Sound. The plaintiffs' drivers were instructed to follow the most direct route between Boeing Field and the said down town district, but they were free to, and did, select the streets over which they travelled, and they usually used Southwest Fourth Avenue or Airport Way when going to and from Boeing Field, as the trip over either street is of equal distance, but in cases of traffic congestion or when streets were undergoing repairs, the drivers themselves selected other streets upon which to travel. In returning to the business district from said Field, Southeast Ninth Avenue was used from time to time by some drivers.

### XIII.

Approximately 50 per cent of the air line passengers used limousine service and from 10 per cent to 15 per cent of all flights were postponed by the air lines due to weather conditions. About 5 per cent of the flights were to and from fields other than Boeing Field due to weather conditions, and Boeing Field during the war period was temporarily closed to civilian use. In cases of such emergencies, the plaintiffs carried air line passengers by means of said limousines or other motor vehicles to Paine Field or the Seattle-Tacoma Airport, distances of approximately 30 and 11 miles, respectively, from said down town district of Seattle, and when limousines were being operated by plaintiffs

to or from either Paine Field or the Seattle-Tacoma Airport, no limousines were operated between said Boeing Airport and said down town district of Seattle. No taxes for transportation on the limousines or other motor vehicles used in the transportation of persons to or from Paine Field and Seattle-Tacoma Airport are involved in this action.

#### XIV.

Under the agreement and/or arrangements with the air lines, the plaintiffs were required to meet all incoming scheduled plane flights and frequently limousines were sent out to the airport, without passengers, to meet an incoming plane. If there were no incoming air line passengers using the limousine transportation back to the metropolitan area, the limousine might wait at the airport until the arrival of the next scheduled flight or be ordered back to town by plaintiffs' dispatcher. It was sometimes necessary to order limousines back from an airport to the metropolitan area in order to transport passengers from the metropolitan area to a scheduled outgoing flight.

#### XV.

Plaintiffs' limousines never accepted passengers without being called by the air lines' office and being told whom the passengers were and the time and places where passengers were to meet the limousine for departure. The City of Seattle maintains a city street bus line running from its metropolitan area to the Boeing Airport under the management of the Seattle Transit Commission, a

Commission consisting of three people appointed by the Mayor of said City, and this city street bus line operates on an established time schedule over the city streets on a fixed route.

## XVI.

All of said vehicles, including the said eleven-passenger limousine, are licensed as "for hire" vehicles under the laws of the State of Washington, as defined in Section 6312-1, et seq., Remington's Revised Statutes of Washington, and operate as "for hire" vehicles in the City of Seattle under Ordinance No. 59866.

## XVII.

Prior to October 10, 1941, the plaintiffs' established one-way fare was \$.75 between the designated places of departure in the metropolitan area and the Boeing Airport, and the same one-way fare was charged between the airport and the metropolitan area. On October 10, 1941, the plaintiffs started collecting \$.80 per passenger. Section 3469 of the Internal Revenue Code, as added by Section 554 of the Revenue Act of 1941, imposing a transportation tax of 5 per cent, became effective on said date. The plaintiffs, starting November 1, 1942, through November 21, 1942, collected \$.84 per passenger. The tax rate was increased by Section 609 of the Revenue Act of 1942 to 10 per cent, effective on said November 1, 1942. On November 22, 1942, plaintiffs started collecting \$.85 per passenger until April 1, 1944, and on and after said date began collecting \$.90 per passenger. Section 302(a) of

the Revenue Act of 1943 became effective on said April 1, 1944, and it increased the rate to 15 per cent. From October 10, 1941, to April 1, 1944, the air lines were billed by plaintiffs for \$.75 per passenger carried at the air lines' expense, plus 5 per cent or 10 per cent of the amount billed as a tax, depending upon the tax rate then in effect. On and after April 1, 1944, the air lines were billed by the plaintiffs for \$.78 per passenger carried at the air lines' expense, plus 15 per cent of the amount billed as a transportation tax.

### XVIII.

Plaintiffs furnished their drivers with new schedules of airport fares upon the effective date of each increase mentioned in paragraph XVII. The drivers would collect the fares existing at the time for the transportation from the passengers carried, except passengers carried at the expense of the air lines, and in cases where a passenger would ask what the fare included, a driver himself would tell the passenger it included the tax.

### XIX.

Plaintiffs' drivers turned in the cash collected with their "daily turn-in sheets" to their dispatchers who checked them and prepared a daily operating report, summarizing cash fares, tax, charge fares and tax. Plaintiffs' bookkeeper prepared "monthly summary of daily operating reports."

The cash fares and tax were then entered in the plaintiffs' cash journal. Exhibit A-12 is the cash journal sheet of plaintiffs for October, 1941. The

cash fares and tax were maintained as separate items and the amounts reported in the tax returns filed are the sum of the monthly total collected as taxes on cash fares and the monthly total billed to and collected from the air lines as taxes. The amounts collected as taxes in the cash journal were posted monthly to an account in the plaintiffs' general ledger entitled, "Federal Transportation Tax," Account No. 2020E. The taxes are shown on the plaintiffs' books as an accrued liability account and the taxes collected, as aforesaid, have not been closed into the plaintiffs' profit and loss account nor reported in its income tax liability during any of the period involved.

## XX.

All sums collected from the individual passengers and from the air lines, including the amounts billed and collected as tax, were deposited in the plaintiffs' bank account and the sums paid by plaintiffs to the defendant, as shown by said returns, were paid by checks drawn by plaintiffs on their said bank account.

From the foregoing Findings of Fact, the Court makes the following

### Conclusions of Law

#### I.

That during the period October 10, 1941, through September 30, 1944, the plaintiffs, in transporting passengers in their motor vehicles involved in this action, were operating said vehicles "on an established line" within the meaning of Section 3469



of the Internal Revenue Code (Title 26, U.S.C., Section 3469), and the Regulation promulgated thereunder.

## II.

That the taxes assessed and collected were in all respects legal and in strict accordance with the law.

## III.

The judgment should be entered dismissing plaintiffs' complaint, with costs to the defendant to be taxed by the Court.

Dated this 16th day of June, 1947.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ HARRY SAGER,  
Asst. U. S. Atty.

Approved as to form:

/s/ RANDALL S. JONES,  
Of Attorneys for Plaintiffs.

Plaintiffs object separately and specifically to the failure to include in the above findings each and all of the following facts:

(1) Air line passengers being transported from Boeing Field were carried anywhere within the downtown district (bounded as set forth in finding XII) that they desired to go, and the limousines stopped anywhere within said district, at the request of a passenger, to let such passenger out (Transcript pp. 14, 15, 72, 82 and 95).



(2) There were fifteen or more incoming and fifteen or more outgoing flights each day to and from Boeing Field (Transcript pp. 10, 23 and 34).

(3) When the arrival of a plane was delayed the air line company would notify the plaintiffs' dispatcher of that fact, together with the estimated time of arrival of the delayed plane (Transcript p. 30).

(4) The information given plaintiffs' dispatcher by the air lines governed the departing time of plaintiffs' limousines. No trips were run without such orders from the air lines (Transcript pp. 58, 59 and 85).

(5) Plaintiffs maintained no schedules of the departure of their limousine service (Transcript p. 64), and they did not publish or post for the use or perusal of the general public schedules of the departures of the limousines from the airport or from the pick-up points in the downtown area (Transcript p. 58).

(6) Plaintiffs did not at any time advertise in the paper or by poster or in any manner their limousine service (Transcript p. 55).

(7) The schedules of the air line companies were used by the plaintiffs' dispatcher only for the purpose of planning so as to be able to handle the volume of expected transportation (Transcript p. 86).

(7½) The general public was not conveyed by means of the limousine service (Transcript pp. 56 and 87).

(8) The air line companies had the power to specify the routes of travel, but they did not do so (Transcript pp. 11, 57 and 61).

(9) Air line companies had the power to designate the pick-up points in the downtown area, and these were changed from time to time (Exhibit—contract with United Airlines, Transcript 17, 18, 24, 25, 58 and 61).

(10) No public authority specified any route to be followed by plaintiffs' limousines, and plaintiffs had no certificate of convenience or necessity issued by Washington Department of Public Works or Department of Public Service (Transcript p. 55).

(11) No special facilities were provided at the airport for the limousines in receiving and unloading passengers. They performed this service in front of the administration building just as did the private cars and taxi cabs, but while waiting at the airport the limousines would park in an area reserved for them and taxi cabs (Transcript pp. 18 through 21).

(12) Limousines not in use were stored at plaintiffs' garage located at 8th and Lenora (2109 8th Avenue) Seattle, Washington. Limousines dispatched to Boeing Field to meet incoming planes, in most cases, went from plaintiffs' garage directly to field without going to or stopping at the downtown pick-up points. However, occasionally a car was dispatched from a hotel to meet an incoming plane (Transcript pp. 84, 88).

(13) Although an airplane would be departing at a certain time, if the plaintiffs' dispatcher re-

ceived no call for passengers to be transported to the plane, no limousine would be sent to the airport (Transcript p. 86).

(14) If all the passengers going to Boeing Field were at one downtown pick-up point the limousine would not go to any of the other downtown pick-up points before departing for Boeing Field (Transcript pp. 81, 96, 97).

(15) When Boeing Field was closed down no limousine went there to transport passengers. They went directly to the alternate airport. (Transcript p. 90).

The ground for these objections is as follows:

Each and all of the facts specified in these objections are uncontradicted by opposing evidence. They are included in the facts upon which the Court based its decision in this case, and no proper determination of the question of whether said limousines were being "operated on an established line" can be made without taking into consideration all of these facts along with the other facts set forth in the foregoing findings.

Plaintiff further objects to the conclusions of law on the ground presented to the Trial Court at and during the trial of the above entitled case, namely, that under all of the facts of this case the plaintiffs were not operating their said limousines on an established line within the meaning of Section 3469 of the Internal Revenue Code.

/s/ RANDALL S. JONES,

Of Counsel for Plaintiffs.

[Endorsed]: Filed June 16, 1947.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

Civil No. 876

E. ROYCE, B. ROYCE, and A. H. WENCK,  
d/b/a GRAY LINE TOURS,

Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of In-  
ternal Revenue for the District of Washington,  
Defendant.

### JUDGMENT

The above-entitled cause came on regularly for trial on the 1st day of May, 1947, before the above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiffs appearing by their attorneys, Robert T. Jacob, Esq., Randall S. Jones, Esq., and Joseph E. Gandy, Esq., being represented in Court by Randall S. Jones, Esq., and defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant United States Attorney for said District, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in Court by Thomas R. Winter, and the Court having signed and entered an order on the pre-trial hearing and witnesses having been

sworn and having testified, exhibits introduced in evidence, oral argument by counsel, and the Court having rendered an oral opinion and the Court having made and entered its Findings of Fact and Conclusions of Law herein, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs' complaint be, and the same is, hereby dismissed with prejudice, with costs to the defendant to be taxed by the Clerk.

Dated this 16th day of June, 1947.

/s/ CHARLES H. LEAVY,  
United States District Judge.

Presented by:

/s/ HARRY SAGER,  
Asst. U. S. Atty.

Approved as to form:

/s/ RANDALL S. JONES,  
Attorney for Plaintiffs.

[Endorsed]: Filed June 16, 1947.

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that E. Royce, B. Royce and A. H. Wenck, d/b/a Gray Line Tours, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of June, 1947, and from the whole of said judgment, which judgment dismissed the plaintiff's complaint with prejudice and with costs to the defendant to be taxed by the Clerk.

Dated, August 22, 1947.

/s/ R. T. JACOB,

/s/ RANDALL S. JONES,

Attorneys for the appellants,

E. Royce, B. Royce and

A. H. Wenck.

State of Washington,

County of King—ss.

Due service of the foregoing Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for plaintiffs.

/s/ THOMAS R. WINTER,

Of Counsel for defendant.

Copy of the within and foregoing Notice of Appeal delivered to U. S. Attorney, Tacoma, and to



Thos. R. Winter, attorney for U. S. Int. Rev. Bureau, at Seattle, this 23rd day of August, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division, Aug. 22, 1947. Millard P. Thomas, Clerk. By E. R., Deputy.

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[Title of District Court and Cause.]

### BOND ON APPEAL

Know All Men by These Presents, that E. Royce, B. Royce and A. H. Wenck, doing business under the firm name and style of Gray Lines Tours, as Principals, and the Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, organized and existing under the laws of the State of Delaware, and authorized to do business under the laws of the State of Washington as a surety company, as surety, are held and firmly bound unto the above named Clark Squire, United States Collector of Internal Revenue for the District of Washington, in the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, to be paid to the said Clark Squire, his personal representative or assigns, for the payment of which well and truly to be made, we bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally, firmly by these presents.

Whereas on the 16th day of June, 1947, a judg-

ment was entered in the above entitled Court and cause dismissing with prejudice the complaint of the plaintiffs, E. Royce, B. Royce and A. H. Wenck; and said plaintiffs feeling aggrieved by said judgment are appealing therefrom to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this obligation is such, that if the said E. Royce, B. Royce and A. H. Wenck, as appellants, shall pay all costs awarded and/or taxed against them if this appeal is dismissed or said judgment is affirmed, or shall pay all such costs as the appellate court may award against them if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the principals have caused these presents to be executed this 22nd day of August, 1947, and the surety has caused these presents to be executed on said day by its duly authorized representative and its corporate seal to be affixed thereto.

E. ROYCE, B. ROYCE and

A. H. WENCK, d/b/a

GRAY LINE TOURS,

By /s/ A. H. WENCK,

Principal.

SAINT PAUL-MERCURY

INDEMNITY COMPANY,

[Seal]

By /s/ W. A. WILLIAMS,

Attorney-in-Fact,

Surety.

State of Washington,  
County of King—ss.

Due service of the foregoing Bond on Appeal to the Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones of attorneys for the plaintiff.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANTS INTEND TO RELY

The above-named plaintiffs and appellants intend to rely on the following points on their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. The findings of fact are incomplete in that they do not include material and ultimate facts clearly established by the evidence, and they do not cover all the material issues in the case, and the trial court erred in failing to include such facts and to cover such issues in the findings of fact.

2. The trial court erred in failing to include in its findings of fact each and all of the facts set forth in the plaintiff's objections appended to said findings of fact, all of which facts are established by the evidence and are essential to a proper determination of this case.

3. The trial court erred in deciding and finding

(Conclusion of Law I, being regarded as a finding of ultimate fact) that plaintiffs in transporting passengers in their motor vehicles involved in this action were operating the same "on an established line" within the meaning of Section 3469 of the Internal Revenue Code and Regulations promulgated thereunder in that the evidence clearly shows plaintiffs were not operating their said motor vehicles "on an established line" within the meaning of said Code section; and said decision and finding are not supported by the evidence and are contrary to the evidence and contrary to the law governing this case.

4. The trial court erred in making each and all of its conclusions of law in that they are each contrary to the evidence and contrary to the law governing this case.

5. The trial court erred in admitting defendant's Exhibit No. A-1 over the plaintiff's objection for the reasons set forth on page 16 of the Reporter's Transcript of Proceedings of the trial.

6. The trial court erred in treating Bureau of Internal Revenue Regulations 42, Section 130.58, as though it had the force and effect of law.

7. The trial court erred in rendering judgment dismissing the plaintiffs' complaint with prejudice in that the evidence is insufficient to support said judgment and it is contrary to the evidence and contrary to the law governing this case.

Dated this 22nd day of August, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Plaintiffs  
and Appellants.

State of Washington,  
County of King—ss.

Due service of the foregoing Statement of Points on Which Appellants Intend to Rely is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for the plaintiffs.

/s/ THOMAS R. WINTER,  
Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

The plaintiffs and appellants hereby designate the following portions of the record, proceedings and evidence in this case to be contained in the record on appeal of this cause to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Complaint.
2. Order of April 24, 1946, transferring case from Northern to Southern Division of the District Court of the United States for the Western District of Washington.
3. Answer.
4. Order on Pre-Trial hearing.



5. All of reporter's stenographic transcript of proceedings of trial, including the testimony of all of the witnesses.

6. All of the exhibits admitted in evidence at the trial.

7. Findings of Fact and Conclusions of Law with plaintiffs' objections to the same appended thereto.

8. Judgment, with notation of docket entry thereof.

9. Notice of Appeal to the United States Circuit of Appeals for the Ninth Circuit, with acceptance of service and date of filing.

10. Bond on Appeal, with acceptance of service and date of filing.

11. Statement of Points on which appellants intend to rely on appeal, with acceptance of service and date of filing.

12. This Designation of the Contents of the Record on Appeal with acceptance of service and date of filing.

13. Order to send original exhibits to the clerk of said appellate court with and as part of the record on appeal.

Dated this 22nd day of August, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Plaintiffs  
and Appellants.



State of Washington,  
County of King—ss.

Due service of the foregoing Designation of Contents of Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit is hereby accepted at Seattle, Washington, this 22nd day of August, 1947, by receiving a copy thereof, duly certified as such by Randall S. Jones, of attorneys for the plaintiffs.

/s/ THOMAS R. WINTER,

Of Counsel for Defendant.

[Endorsed]: Filed Aug. 22, 1947.

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[Title of District Court and Cause.]

### ORDER

Upon motion of the plaintiffs-appellants herein, by Randall S. Jones of their attorneys, and upon good cause being shown therefor,

It Is Ordered that the clerk of this Court be and he is hereby authorized and directed to send to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit with and as a part of the record on appeal in this cause all of the original exhibits introduced in evidence at the trial of the above-entitled action, and

It Is Further Ordered that said original exhibits need not be copied into the record on appeal, and that said exhibits are to be sent to the clerk of said appellate court with the request that he safely keep and return the same to the clerk of this court upon final determination of this cause in the appellate court.

Dated at Tacoma, Washington, this 25th day of August, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Requested by:

RANDALL S. JONES,  
Of Counsel for Plaintiffs.

Approved:

THOMAS R. WINTER,  
Of Counsel for Defendant.

[Endorsed]: Filed Aug. 25, 1947.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD  
ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 42, inclusive, together with the original Transcript of Proceedings, consisting of pages numbered 1 to 128, inclusive, and Plaintiffs' original exhibits, numbered 1 to 6, inclusive, and Defendant's original exhibits, numbered A-1 to A-10, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 876, E. Royce, B. Royce and A. H. Wenck, dba Gray Line Tours, Plaintiffs, vs. Clark Squire, United States Collector of Internal Revenue for the District of Washington, Defendant, as required by Plaintiffs-Appellants'

Designation of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitute the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Transcript of Proceedings and the original exhibits above-mentioned have this day been transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee.....	\$ 5.00
Clerk's fee for preparation of	
Record on Appeal.....	5.30
	<hr/>
	\$10.30

and I further certify that the said fees, above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 20th day of September, 1947.

[Seal]                      MILLARD P. THOMAS,  
Clerk.

By /s/ E. E. REDMAYNE,  
Deputy.

In the District Court of the United States for the  
Western District of Washington, Southern  
Division

No. 876

E. ROYCE, B. ROYCE, and A. H. WENCK,  
d/b/a Gray Line Tours,

Plaintiffs,

vs.

CLARK SQUIRE, United States Collector of In-  
ternal Revenue for the District of Washington,  
Defendant.

### TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 1st day of May, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the plaintiffs appearing by Messrs. Randall S. Jones and Robert T. Jacob, and the defendant appearing by Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue.

Whereupon the following proceedings were had and done, to-wit: [1\*]

The Court: We will proceed with the call of the calendar.

Docket 876, E. Royce and others versus Clark Squire. Are the parties ready to proceed now?

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\* Page numbering appearing at foot of page of Reporter's certified Transcript of Record.

Mr. Winter: The defendant is ready, your Honor.

Mr. Jones: Yes, your Honor.

The Court: I have not signed the pretrial order.

Mr. Winter: If the Court please, before your Honor does sign the pretrial order, I have a matter to bring up with the Court in that connection. It was briefly mentioned to your Honor at Seattle, when the pretrial order was presented to your Honor. As was explained to the Court, subsequent to the preparation and signing of the pretrial order it was discovered by counsel for the defendant and counsel for the plaintiff that for some considerable period during the time involved in the assessment and collection of this tax, the Gray Line Tours was a corporation, duly organized and existing under the laws of the State of Washington, and for several months, at least, returns were prepared and apparently the tax was paid by that corporation. Now the plaintiffs are suing here as a partnership, doing business as the Gray Line Tours.

The pretrial order will have to be amended and we ask leave to amend it to show, in accordance with the exhibits—and I didn't have copies of the exhibits, that during the date—or during the months which those returns were prepared and filed by the corporation, that the plaintiffs did not file their returns, nor did they pay the tax during that period, but that returns were filed by the corporation and who has not filed a claim for refund in this case. However, if counsel will stipulate, or is it a fact, Mr. Wenck, who is the president—who I



think was one of the officers of that corporation is here, and it's my understanding that the plaintiffs were the liquidating trustees of this corporation; that all of the assets and liabilities of the corporation were taken over by the partnership, including the assumption of any contracts, or any obligations under contracts, and all other assets of the corporation were turned over to these plaintiffs, and therefore they would, as a matter of right, be entitled to file a claim for refund if such were the allegations and maintain this action, as by operation of law having assumed those obligations and not being an assigned claim. Now, if it is so understood—in other words, we would be confronted if we don't have a stipulation or agreement from the corporation and the duly authorized officers, they could then bring a suit later on and say that they paid the tax— [3] or the liquidating trustees could.

Mr. Jones: That's agreeable.

Mr. Winter: So it is understood then, that the assets as I stated, were transferred to these individuals.

Mr. Jones: That's agreeable.

Mr. Winter: Then with that understanding I think the order may be considered as amended to conform with those.

The Court: It will be so considered. Of course the order itself is, I think, silent on that particular matter, is it not?

Mr. Winter: Yes, your Honor. If your Honor would prefer that the——



The Court: Well the order does not recite to the contrary either, does it?

Mr. Winter: No, that's right, except the order recites that we admit that the plaintiffs paid it; that the only amendment that would be necessary in that regard, that the plaintiffs' predecessor corporation paid it, and the plaintiffs on behalf—filed their claims for—they were authorized by law to file their claims for that tax which was paid, having assumed the liabilities and also having acquired all of the assets and rights and title and interest in the property. [4]

The Court: Well, on February 28, 1942, was it a corporation?

Mr. Winter: On February 28, '42?

The Court: Yes.

Mr. Jones: It was early in '42, your Honor, I think.

Mr. Winter: No, the return for October '41 was filed by the corporation. The return for November '41 was filed by the corporation. The return for December '41 was filed by the corporation. The return for January '42 was filed by the corporation. The return for February 1942—for March 1942 was filed by the corporation. The return for April, 1942, was filed by the corporation. The return for May, 1942, was filed by Gray Line Tours, without indicating the corporation setup. In other words, on the first return on that month struck out from the printed part, showing the name Gray Line Tours. the words "I-n-c." The name was changed appar-

ently from Gray Line Tours, Inc., as a corporation to Gray Line Tours, which has been the allegation all through the complaint.

The Court: And this sum of \$16,423.51 includes——

Mr. Winter: Both papers.

The Court: Both returns.

Mr. Winter: Yes. [5]

The Court: And do these pretrial exhibits 1, 2, and 3 show what you have just proposed?

Mr. Winter: Yes, Your Honor.

The Court: In your stipulation?

Mr. Winter: Yes, Your Honor. I was reading from exhibits. Its exhibit—I was reading from exhibit 1 and 2.

The Court: I think the oral stipulation modifying—or rather expanding the written pretrial order will be sufficient without any formal——

Mr. Winter: Very well.

The Court: I make that statement because Paragraph IV fixes pretrial exhibits 1, 2, and 3 as the basis for the recovery in the sum that is sought here——

Mr. Winter: Yes.

*The Court:* And that would cover both periods. There is, in that connection, while it might be confusing to Your Honor, Exhibit 3 will show a few hundred dollars more payment sought to be recovered, but we have admitted the amount which they have claimed, and so that will be immaterial, except——

Mr. Jones: That is right.

The Court: Very well, with that understanding I will sign this pretrial order, and for the purposes of this case the exhibits will be identified as they are [6] in the pretrial order, as agreed exhibits rather than exhibits for the plaintiffs or exhibits for the defendant.

Mr. Jones: Very well.

Mr. Winter: We, on the part of the defendant, we will offer those exhibits if necessary, and except as to—reserving objection to the materiality of any exhibit they are offering.

Mr. Jones: Well I had the thought that there were certain exhibits that were essential to my case, and that I would offer those that were—and there are two or three that I feel that I should object to that the defendant wishes of offer, and at the close of my opening statement I will offer the exhibits.

The Court: Well, if there is any disagreement as to the exhibits at all, they will be identified in the progress of the trial as exhibits for plaintiffs and exhibits for defendant, identified in the pretrial order by the reference given there. one, two, three, four, or five for the purpose of the trial and this record, they will be identified regularly as they would if there were no pretrial order. because I take it from what has just been stated, there may be some of them that would be rejected and would not be a part of the record.

(Whereupon opening statements by counsel.)

## A. S. DIBBLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

## Direct Examination

By Mr. Jones

Q. Mr. Dibble, will you state your name in full for the record.?

A. The initials are A. S. Dibble, D-i-b-b-l-e.

Q. With whom are you employed?

A. With United Airlines.

Q. How long have you been employed with the United Airlines?      A. Eleven years.

Q. How long have you been employed in the City of Seattle?      A. Four years.

Q. Then it is true that you are employed in Seattle?      A. Yes, sir.

Q. And what is your position in Seattle?

A. Passenger Service Manager.

Q. And have you had that position all the four years?      A. Yes, sir.

Q. Would you explain to what extent that position of yours and your duties, has to do with the supervision of the—making arrangements for your airplane passengers to use [8] limousine service?

A. Well, I am responsible for the supervision and maintaining—maintenance of the ground transportation service—that is, to maintenance of the standards that we want to maintain.

(Testimony of A. S. Dibble.)

Q. Can you—

The Court: Just a moment. Do I understand you are working for both the City of Seattle and for the airlines?

The Witness: No, sir. It is simply my responsibility to see that all passengers are provided—

The Court: Well, are you an employee of the City of Seattle?

The Witness: No, sir, I am employed by United Airlines.

Q. Can you give, or have you any information as to approximately what percentage of your flights out of Boeing Field are delayed by weather conditions?

A. It would be fifteen to twenty percent.

Q. Can you give any indication of how many flights from, or landings upon fields other than Boeing are made because of either weather conditions or because Boeing Field for some reason is not available?

A. Approximately five percent of our flights that have to use other airports.

Q. Would that be true during the time that you started to work there up until September the 30th, 1944.

A. Well, I came to Seattle in 1943.

Q. Yes, but from that time on to September 30th, '44, would the figures that you gave be true?

A. I would say possibly a higher percentage, because during that period we were restricted from Boeing Field by the Army and used Paine Field for a period of three or four months.



(Testimony of A. S. Dibble.)

Q. Approximately how many flights a day did you have coming in to, and landing at Boeing Field in recent years?

A. Approximately ten departures and ten arrivals a day.

Q. Have you any information as to approximately what portion of your incoming and outgoing airline passengers use limousine service in going to and from the field?

A. I would say about fifty percent of them.

Q. During the war was there a higher or lower—

A. A higher percent during the war.

Q. Used the——

A. Used the limousine.

Mr. Jones: You may cross examine. [10]

### Cross Examination

By Mr. Winter:

Q. You say you went—you came to Seattle about 1943, Mr. Dibble?

A. That's correct, yes, sir.

Q. And you were the ground transportation manager for United?

A. No, my title is passenger service manager. Ground transportation comes under the passenger service.

Q. And that is the position you occupied when you first came here?

A. Yes, sir.

Q. And you still occupy that position?

A. That is correct, yes, sir.

Q. Did you—were you familiar with the—any



(Testimony of A. S. Dibble.)

existing contracts between the plaintiffs, the Gray Line Tours, and the United?

A. I knew that there was a contract.

Q. Did your company designate any routes that the Gray Lines would use meeting your airplane schedule of flights?

A. No, we have the privilege. While I have been here I have had no occasion to designate routes.

Q. Well, you used the limousine service yourself personally, from time to time during that period? A. Yes, I do, sir. [11]

Q. Will you tell the Court approximately what percent of the time they used the same route, going from Boeing to town on incoming flights and on the outgoing flights?

A. My own experience, you mean?

Q. Yes.

A. I would say about fifty percent—about half the time they would use one route and half the time another.

Q. That depended upon— A. Traffic.

Q. Traffic? A. That's correct, yes, sir.

Q. Of course, during the war there was considerable traffic and they took the most direct route they could possibly get with the least traffic, is that right?

A. Traffic certainly had a bearing on what route they would use.

Q. May I see Exhibit 14, please? Under the arrangement with the plaintiffs, Gray Line Tours—well, strike that Who was Mr. J. R. Wanink. W-a-n-i-n-k, do you know?

(Testimony of A. S. Dibble.)

A. Yes, he is the chief passenger agent for the United Airlines.

Q. United Airlines? A. That's right.

Q. Did you receive instructions from him with regard to the route to be taken by the limousines from Gray Line Tours? [12]

A. No, sir. Mr. Wanink is my subordinate.

Q. Your subordinate? A. Yes.

Q. Well, did he make arrangements with the plaintiffs as to the route which they should take?

A. No.

Q. I will show you what has been marked for—exhibit for identification Exhibit 14.

The Court: What is it, the pretrial order?

Mr. Jones: Yes, I had it here. It had my own markings on it.

Mr. Winter I can loan you a copy.

Mr. Jones: I would like to borrow it.

The Court: You may proceed, Mr. Winter.

Q. Have you examined that exhibit, Mr. Dibble?

A. I have read it, yes, sir.

Q. Did you receive a copy of that?

A. I'm sure it must be in my files, yes.

Q. That refers to instructions for direct routes that the airline service is to follow, doesn't it?

A. Well, it refers to routes. It is my opinion that its our general office.

Q. And that was the understanding of United that those routes at that time were being followed, does it?

A. Yes, at that time I think that's correct.

(Testimony of A. S. Dibble.)

Q. What route was being followed that you call, at about that time?

A. Well, from my experience it was optional,—that is, in the riding myself, the driver had the option of using either Fourth Avenue or Airport Way.

Q. Well, what did you understand when you received this communication from one of the other officers of the company, what did you understand that it meant, Exhibit 14?

A. Well, sir, it has been four years—almost four years since it has been received and I receive a considerable amount of correspondence and I don't recall the impression at the time.

Q. Well, isn't it a fact that the limousine when enroute from the airport to the city of Seattle usually took Airport Way, or highway US 99 to about Dearborn Street? Wasn't that the usual route that they took?

A. I think it was customary.

Q. Yes. Then go to—then the bus, or the limousine would go to any hotel designated in a certain area, previously designated in a certain area by either the United or the Gray Lines, isn't that right.

A. They would make any stop within the area.

Q. In a given area?

A. Not restricted to hotels. [14]

Q. The airlines never advised any passengers that they would take them beyond that area?

A. No.

(Testimony of A. S. Dibble.)

Q. As a matter of fact, they advised them that they wouldn't go beyond that area in that limousine service, is that right, or those designated places?

A. The stops were not designated.

Q. Yes, you have—well, under your understanding with the plaintiffs, you had designated hotels which they could leave?

A. From which they would leave.

Q. Yes, to Boeing on the outgoing flights?

A. Yes.

Q. And passengers were only picked up at those designated hotels or places? A. That's right.

Q. And that same procedure, the same routes and everything were taken by the eleven-passenger limousines in their service?

A. That's right.

Q. They didn't follow any different procedure since they acquired the eleven-passenger machines than they did with their seven-passenger limousines?

A. No, that's correct. [15]

Mr. Winter: I think that's all.

Mr. Jones: Just one question.

Mr. Winter: Excuse me, we will offer it in evidence, if the Court please.

The Court: It will be remarked then.

Mr. Winter: Well, I will wait and offer it later, if the Court please. It will be better—

The Court: No, you could offer it now. It could be marked A-1.

Mr. Winter: Defendant's Exhibit A-1.

Mr. Jones: This Exhibit A-1 we object to on the grounds that it is irrelevant and incompetent

(Testimony of A. S. Dibble.)

and immaterial; on the further ground that it supports to be an airline inter-company communication. No evidence has been shown that it was ever brought to the attention of the plaintiffs or that they ever had any knowledge of it, or that it was intended for them to act upon, and on those grounds we object to it.

The Court: Did you save an objection in the pretrial—

Mr. Jones: General objection, if the Court please, on page 10, subject to any and all other objections, the general objections. Also on the ground that it is hearsay as far as the plaintiffs are concerned. [16]

The Court: What exhibit is that in your pre-trial?

Mr. Jones: Exhibit 14, Your Honor.

The Court: The objection will be overruled and an exception allowed.

Mr. Jones: That's all.

Mr. Winter: I'll ask a question.

Q. Who designated the pickup points in the downtown business district of Seattle, which one of the companies designated?

A. Each company will designate their own pickup points.

Q. Well, I mean as between yourself and the Gray Line—who did the designating of where the airline passengers would be picked up?

A. The airline designates.

Mr. Winter: That's all.

(Testimony of A. S. Dibble.)

### Redirect Examination

By Mr. Jones:

Q. That was after a conference with the United—I mean with Gray Line Tours, was it?

A. No.

Q. Well, you discussed it with them—I mean the officers of the United discussed with them the new pickup points, wouldn't they. [17]

A. We would tell them where we wanted the passengers picked up.

Q. And did they ever object to any pickup points?

A. Not to my knowledge, no.

Q. You assumed that it was satisfactory to them?

A. I think so.

Q. You had an understanding that there would only be two or three within a certain area, didn't you, in your contract?

A. The number of pickup points wasn't specified.

Q. They weren't in the written contract?

A. According to my recollection, I'm not——

Q. Well, there never were more than two or possibly three pickup points going out, were there?

A. At the time I've been there, there haven't been more than three.

Mr. Winter: More than three. That's all.

The Court: I want to ask you a question, as to what were the arrangements, if any, concerning these limousines at the field for the—for their parking and for their receiving passengers and for their



(Testimony of A. S. Dibble.)

unloading passengers, was any distinction made between them and some private individual or some taxicab that drove down there? [18]

The Witness: No, absolutely.

The Court: They had no special facilities provided, where they would park to the exclusion of the general public when they were waiting for an incoming plane?

The Witness: Recently there has been a parking area reserved for them—cabs and limousines.

The Court: How recently was that, with—

The Witness: I'd say within a year.

The Court: Subsequent to the time involved in this trial. That's all.

Mr. Winter: Mr. Dibble, I want to ask you one further question.

#### Recross-Examination

By Mr. Winter:

Q. These limousines only carry the passengers which had previously booked flight on a specific flight did they not?

A. That's right.

Q. There were other means of transportation down there if people wanted to go to the airport, but they could use these limousines, couldn't they?

A. I'm sorry, I—

Q. I say, there was other transportation down to the airport. There's city streetcars, a bus line down there, isn't there? And the taxicabs frequently brought people to the airport?

A. Yes, sir.

(Testimony of A. S. Dibble.)

Q. And took them from the airport. Now, isn't it a fact that all of the limousines have since 19—since 1943, had a place in front of the airport where they were—they pulled up and signs were placed there showing that they were either United bus or a Northwest bus limousine?

A. According to my recollection there, it was designated a taxi zone.

Q. A taxi zone?           A. Yes, sir.

Q. They would use the taxi zone. Where would they park during the time they were waiting for an incoming flight? Did they go to the public zone, around the public parking places?

A. No, there was an area removed from the buildings for taxis and limousines.

Q. Right in front of the building?

A. Yes.

Q. In the entrance?

A. That's right, in front of the building, but not in front of the entrance, no. [20]

Q. Well, just a little aside of the entrance?

A. Yes.

Q. And that is where the baggage from the plane is delivered to the limousines?

A. The baggage is delivered at the entrance.

Q. Yes, well, they have a special place there with—roped off with wire, I think, or chained off for the baggage to be delivered to them?

A. Yes, that's correct.

Q. And the airlines pull up to the side of that?

A. Yes, sir.

(Testimony of A. S. Dibble.)

Q. To the side of that place, and the general public can't drive up there in their cars, can they? Except, to the entrance to unload and load?

A. That's right.

Q. But not at this place where the limousines load and unload? A. No.

Mr. Winter: That's all.

Mr. Jones: That's all.

The Court: We will take an intermission now for ten minutes.

(Recess.)

### GEORGE E. HARRISON

produced as a witness on behalf of the Plaintiffs, after being first duly sworn was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Would you state your name in full to the Reporter?

A. George E. Harrison.

Q. Your home? A. Seattle.

Q. What's your occupation?

A. Station manager, Northwest Airlines.

Q. How long have you held that job?

A. Approximately in Seattle about four and a half years.

Q. All the time has it been the same position?

A. Yes, the same.

Q. Have you worked there then, prior to September 30th, 1944.

(Testimony of George E. Harrison.)

A. Yes, I went to Seattle in January of '43.

Q. And have been in this position since?

A. Yes, sir.

Q. Would you briefly state whether or not your duties have anything to do with limousine service to and from that airport?

A. Only in regard to the handling from the airport [22] downtown—that is, supervising the personnel who order the transportation, and see that the passengers are dispatched and so on.

Q. What was the number—approximate percentage of flights that had to be cancelled that your company had during the period of time October 10, 1941, if you know that far back, if not, from 1943 on to September 30th of 1944—what percentage of flights were postponed due to the weather conditions there?

A. You mean the weather——

Q. Just in—relate——

A. Approximately five to ten percent, I would say.

Q. I beg your pardon?

A. Five to ten percent.

Q. How many flights a day did your company have prior to September 30th, 1944?

A. Well, when I came to Seattle there were only two trips a day; within two or three months thereafter we had another one, and shortly thereafter another one, so by the fall of '43, to the best of my recollection we had five in and five out—four or five.

(Testimony of George E. Harrison.)

Q. Four or five take-offs and landings?

A. Well, that would be a total of ten each day.

Q. Now, were there any times——

Mr. Winter: Mr. Jones, the number [23] of flights and schedules were a pretrial exhibit, the amount of tax charged, and everything. I don't want to object, but——

Mr. Jones: Well, this is in my own case, so whatever——

The Court: Well of course where you have stipulated as to certain facts it is unnecessary to make proof on that fact. It just encumbers the record.

Mr. Jones: All right.

Q. Well, were there times when you couldn't use Boeing Field? A. Yes, sir.

Q. What—have you any idea what percentage of your flights took off from fields other than Boeing?

A. Well, I guess maybe five—five percent—ten percent.

Q. Have you any way to check or give us an estimate on the approximate number of your air transportation passengers who used the limousine service?

A. Fifty to sixty percent is the best estimate.

Q. Who designated the pickup points for your company in the down town Seattle area?

Mr. Winter: If he knows.

Q. If you know.

A. They were designated by our district traffic manager in [24] conjunction with — consultation with us at the airport.

Q. With who?

A. With us at the airport.

Q. Oh.

A. We would discuss it and agree on where the pickups would be made.

Mr. Jones: You may cross examine.

### Cross-Examination

By Mr. Winter:

Q. Of course, you don't know what discussion the traffic manager had with the Gray Line Tours prior—with respect to the pickup stops, do you?

A. You mean prior to my coming to Seattle?

Q. Prior to their talking to you out at the airport?

A. I think so, sir.

Q. Were you with them when they had their discussion, if any?

A. Well, we talked about them before we would contact the Gray Lines.

Q. And then you would discuss them with the Gray Lines?      A. Yes, sir.

Q. And if it was satisfactory with them, and they—the points were established, is that right?

A. Yes, sir.

Q. You were limited to a certain area within which you could [25] designate pickup points.

A. Pickup points in the down town area, yes sir.

Q. And you—as a matter of fact, you advised all passengers that they were limited in the outgoing trips to a certain area to let passengers off?

A. In the down town Seattle area, yes, sir.



(Testimony of George E. Harrison.)

Q. Where was the main pickup point in Seattle, the Olympic Hotel, in the down town area?

A. I don't know that you would call it necessarily a main one. There were about two or three at different times.

Q. Well, a very large majority of passengers did use that place of departure, is that right?

A. At the Olympic?

Q. Yes. A. Yes, sir.

Q. As a matter of fact, about seventy-five percent, wasn't it?

A. That sounds reasonable, yes.

Q. And then you had sometime ago—no, wait a minute. You're with the Northwest?

A. Northwest, yes, sir.

Q. You have an office in the Olympic Hotel building? A. Yes, sir.

Q. And that is one of the points of departure for these [26] passengers? A. Yes, sir.

Q. Do you have anything to do with the paying of the transportation of passengers on cancelled flights?

A. That was handled by the agent either at the down town office, or at the airport.

Q. I see. You would give them a—did you give any statement to the Gray Lines as to cancellations or anything of that nature?

A. We'd give them an order.

Q. And did you make any charge to the passengers when—for any transportation at any time on these airline services?

A. Did we charge the passengers?

(Testimony of George E. Harrison.)

Q. Yes, at any time, yes.

The Court: You mean for the limousine service?

Mr. Winter: Yes, for the limousine service.

A. No, we don't charge them for that.

Q. On these five to ten percent of the flights which were used—where you used airports other than the Boeing Field, who paid the cost of transportation for the passengers on those flights, do you know?

A. The inbound transportation would be paid by Northwest Airlines. [27]

Q. And what about the outbound?

A. Well, if we used the Seattle-Tacoma Airport, the passengers would pay the normal fare of their outgoing trip.

Q. And would you reimburse the Gray Lines for any additional?

A. For the additional fare.

Q. You published schedules of your flights?

A. Yes, sir.

Q. I mean, regular time schedules?

A. Oh, yes.

Q. And those flights were scheduled to depart and arrive on those times? A. Yes, they—

Q. And when you say that five or ten percent of the flights were delayed, that was because of weather conditions?

A. Well, a combination of weather and other conditions.

Q. Yes. It was always your purpose to have the flights go out on schedule? A. Yes, sir

(Testimony of George E. Harrison.)

Q. And so far as humanly possible they did go out on schedule, depending on conditions?

A. Oh, yes.

Q. And all the other flights the other ninety-five percent [28] of the time they did go out on schedule and arrive on schedule?

A. Well, I don't know about the arrival on schedule; they departed on schedule.

Q. The limousines were always furnished for the particular flight and were out there to take the passengers that came in on an incoming flight, is that right?

A. According to our orders, yes.

Q. And you published the fares on the limousine service for the ground service?

A. That's in our public transportation, yes, sir.

Q. And you showed as an item the tax included upon those fares, didn't you?

A. I don't—yes, I believe it includes the tax.

Q. And if you were ever—its your experience if you were ever advised by a passenger that it was so much fare plus tax,—I mean, if they ever asked you what the fare was you told them it included tax, if they asked you, didn't you?

Mr. Jones: Now just a second. I have sat here and let you go a long way beyond the direct examination. If Mr. Winter wishes to make this witness his own we have no objection, but I think the cross examination has greatly exceeded the direct.

The Court: Let's proceed. [29]

(Testimony of George E. Harrison.)

Q. Did you ever use the limousine service yourself?

A. I don't think I've used it more than twice in the last four years, sir.

Q. Was that on schedules which you were going to meet or on ingoing or outgoing, on planes, or something of that nature?

A. One time I was going. The time that I recall I was going from town to the airport in a limousine carrying another airlines passenger. I just happened to be available to go at that time.

Q. Would you pay your transportation for that trip?

A. Yes, I paid transportation for that trip out to the airport.

Q. Yourself, personally? A. Yes.

Mr. Winter: I think that's all.

The Court: What was your practice when an incoming plane was greatly delayed?

The Witness: We would—you mean as far as providing transportation?

The Court: Yes, for providing transportation.

The Witness: We would inform the Gray Line Company that the trip would be delayed and the estimated arrival time.

The Court. Did you inform any other service of that fact?

The Witness: Only other airlines if we had connecting passengers.

The Court: I mean any other taxi service.

(Testimony of George E. Harrison.)

The Witness: No, no other taxi service.

The Court: That's all.

Mr. Winter: That's all.

The Court: Mr. Jones, do you have any other questions?

Redirect Examination

By Mr. Jones:

Q. Each time that a limousine is to come to the airport with passengers or to meet a plane, was the dispatcher of the plaintiff company, the Gray Line Tours, notified? A. Yes.

Q. By what company?

A. By Northwest Airlines.

Q. That was the case in all trips?

A. For our passengers, yes.

Mr. Jones: That's all.

Recross-Examination

By Mr. Winter:

Q. Well, would you notify the dispatcher if the plane was [31] on schedule? It wouldn't be necessary to call them, would it?

A. We call them for all trips.

Q. And at the same time you tell them the number of passengers that were expected to be using the airline service?

A. Yes, how many we expected to be in.

Q. As a matter of fact when they purchase a ticket you ask the passengers, whether, for example,

(Testimony of George E. Harrison.)

if he is going to Portland, whether he is going to use the airline service down there, don't you?

A. Yes.

Q. And its radioed in from the plane?

A. No, sir, not radioed. Its transmitted by land line teletype.

Q. Well, the information is——

A. Its communicated.

Mr. Winter: Communicated. That's all.

(Witness Excused)

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### FRED G. MILLIGAN

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Will you state your name in full into the record?

A. Fred G. Milligan, M-i-l-l-i-g-a-n.

Q. Who are you employed by, Mr. Milligan?

A. Pan-American Airways.

Q. Were you employed by them from October the 10th, 1941 to September 30th, 1944?

A. Yes, sir.

Q. What was your job during those years?

A. I came here to Seattle from Fairbanks in May 15, 1940, and I was assistant airport manager.

Q. For Pan-American?           A. Yes.



(Testimony of Fred G. Milligan.)

Q. During that period of time how many flights in and how many flights out of Boeing Field did you have every day?

Mr. Winter: I think we have schedules of all those flights, Mr.—

A. Well it varied from year to year. [33]

Q. Have you got schedules for each period?

Mr. Winter: Well, we— A. In '41—

Mr. Jones: I'm just asking. It won't take him but a minute to answer.

A. Well, it would vary from year to year. In 1941 we only had three planes, so we made four round trips a week to Fairbanks.

Q. And then did it increase?

A. And then in 1942 we started our Navy contract, and then we had about fifteen planes running out to Adak.

Q. How many trips a day then?

A. Well, about seven trips a day with the Navy contract.

Q. In and seven out? A. Yes.

Q. Were any of those delayed by weather?

A. Practically all of them—practically all of them coming in.

Q. And what about going out?

A. Well, I'd say they got out, oh, at least eighty percent on time.

Q. Twenty per cent was delayed by weather—

A. Yes.

Q. —going out. [34]

Mr. Winter: No, coming in.

(Testimony of Fred G. Milligan.)

A. Not by weather, but by maintenance and weather both.

Q. Yes, but for some reason or other there were those delays?      A. Yes.

Q. At any time during that period did you operate out of some other field than Boeing?

A. Well, at the start of the war we were operating for about five months out of Paine Field, and we also operated out of Bow Lake after it was completed.

Q. Is Bow Lake the Seattle-Tacoma——

A. Yes, the Seattle-Tacoma Airport, yes, sir.

Q. Can you give an estimate of the approximate percentage of your trips that operated from fields other than Boeing?

A. Oh, I think about five.

Q. Per cent?      A. Yes.

Q. Did your company put calls in to the dispatcher of the Gray Lines?      A. Yes, sir.

Q. For all trips?

A. For all trips, coming and going.

Q. What—when there was a delay, how was it handled?

A. Well, it was handled by 'phone. I would call the Gray [35] Lines' dispatcher and tell him the conditions of the weather, and sometimes—most of the time it wasn't the Seattle weather that caused the delay. It was up around Alaska where it was pretty tough flying, and probably we couldn't get into Port Harvey or the next alternate, so we'd probably be late two or three hours on account of that.

(Testimony of Fred G. Milligan.)

Q. Were your flights on call during those weather——

A. The crew and everybody was there.

Mr. Jones: You may cross-examine.

*Cross-Examination*

By Mr. Winter:

Q. In 1941 you were operating regular flights to Alaska for the general public, were you not?

A. Yes, sir.

Q. When did you—did you change and then start operating there when the flights were limited to military personnel?

A. We flew our civilian equipment to Fairbanks and Juneau, and we flew the Navy ships to Adak, the personnel only,—Navy personnel.

Q. Did you maintain regular scheduled flights for civilians other than those which were connected with the Army or under priorities? [36]

A. Yes, sir. Well, no I would say those that we flew were civilians who had priorities.

Q. I see. They were all checked by the government——

A. All checked through the priority board, yes, sir.

Q. The general public then couldn't use the flights without getting——

A. Without getting a priority, no.

Q. Then you say about eighty per cent of your flights departed on schedule, but coming from Alaska a goodly portion of them were delayed?

(Testimony of Fred G. Milligan.)

A. Well, practically darn few of them ever got into Seattle within 25 minutes of schedule.

Q. You would always notify the Gray Line Tours the number—you'd have to call them to notify them the number of passengers who desired limousine service?

A. No, sir, we weren't allowed to.

Q. You weren't?

A. We weren't allowed to tell them how many passengers were coming in or going out.

Q. That was a restriction. Well, I mean prior to that time you did?

A. Well, the navy handled most of the passengers with their own buses.

Q. I see. [37]

A. And we handled the passengers that had priorities and were flying as commercial passengers.

Q. Were you operating under the same contract or arrangement with the Gray Lines that the United and the Northwest were operating——

A. Well, we never had any contract. I know we had an agreement with them.

Q. You mean a written contract?

A. I don't know if they had a written contract or not.

Q. But they did have a general understanding?

A. They had a general agreement, yes.

Q. Who is Mr. Bernhardt?

A. He was assistant traffic manager.

Q. For Pan-American Airways?

A. Yes, sir.

(Testimony of Fred G. Milligan.)

Q. I'll show you what has been marked for identification Defendant's Exhibit A-2.

Mr. Jones: Now, if the Court please, with respect to that exhibit, it is dated March 8, 1945, some six months after this period of time had gone by that we are interested in in this case. I think that it is for all purposes irrelevant, incompetent and immaterial. We have no desire to keep the information that the letter contains from the Court. For that reason, we are [38] not going to make any objection to it, but I do want to note into the record that we do not feel that it has any bearing on the outcome of this case.

Q. You will note that the letter refers to a change of pickups and departure points.

A. That's right.

Q. Did the pickup and departure points change from time to time under an agreement with the United and the Gray Lines?

A. Yes. I don't know about the United.

Q. Yes, I mean the Pan-American.

A. Yes, they changed from time to time.

Q. And that was as the result of conferences or agreements between the parties?

A. That's right.

Q. Passengers were never consulted about what points they were to be picked up at, were they?

A. Yes, I always called them personally.

Q. Yes, but you told them at what points they had to be picked up, didn't you?

A. I told them—I gave them the three places.



(Testimony of Fred G. Milligan.)

Q. Yes, and that was all?

A. That was all.

Q. And they couldn't be picked up anywhere else? [39]

A. Well, once in a while they would detour like to the Roosevelt Hotel or somewhere, if it was in the downtown district.

Q. But that was the exception rather than the rule? A. That's right.

Q. And an important personage might be picked up at some place?

A. Yes, we picked up an admiral.

Q. Yes, that was then the Navy was running it—the show, is that right? A. Yes.

Mr. Winter: That is all.

Mr. Jones: That's all.

Mr. Winter: We will offer in evidence Defendant's Exhibit A-2.

Mr. Jones: Now, if the Court please, these three witnesses all came in the same car and I want to try and let them all go back.

The Court: This exhibit will be admitted.

(Whereupon, document referred to was received in evidence and marked Defendant's Exhibit A-2.)

(Witness excused.)

Mr. Jones: There is one question I'd like to ask Mr. Dibble before he goes back. He's been on the stand once, and may I call him again? Mr. Dibble.



ARTHUR S. DIBBLE

recalled as a witness on behalf of the Plaintiffs, was examined further and testified as follows:

Direct Examination

By Mr. Jones:

Mr. Jones: May I see that first exhibit that was introduced, A-1?

Q. For what purpose was that exhibit—is that called A-1?      A. A-1, yes, sir.

Q. For what purpose was Exhibit A-1 made?

Q. Yes, the letter.

Q. Yes.

A. For what purpose was the letter written?

A. Yes, the letter.

A. It was in reply to an inquiry from our general headquarters, and the inquiry requested information, as I recall, as to what points we were——

Mr. Winter: Well, now, if the Court please, if he is going to talk about an inquiry on a written document, I think it should be produced.

The Court: Oh, he may go ahead and answer. Go ahead, please.

Mr. Jones: I didn't offer it in evidence.

Mr. Winter: You are asking now, and the Court has permitted it. [41]

The Court: Let's proceed.

A. The inquiry requested information as to what points were being used at that time to pick up passengers in the city, and what routes were used generally at that time, between the Airport and the city, and this is the reply to that inquiry.

(Testimony of Arthur S. Dibble.)

Q. Was that reply going to your home office just as it is, or was that a reply from the gentleman that signed it, to you?

A. No, the inquiry was directed to this man, with a copy to me, and the reply was directed over his signature to the general office with copy to me.

Q. Do you know whether the plaintiffs ever got a copy of that letter—were the Gray Lines provided with a copy of that?      A. Not to my knowledge.

Q. Did you at any time in your capacity since you have been in this position, give any orders to Gray Lines as to what streets to travel?

A. No, sir.

Q. Do you know what the foundation for the information that was provided in that letter—where the gentleman that wrote it got his information?

A. Well, it would either be through his own personal observation as to the routes being used, or he might—— [42]

Mr. Winter: Now, if the Court please, this is going into conjecture as to what this other man had in mind.

The Court: Oh, he may answer so we can get along.

Q. Do you know anything about where he got his information?      A. I can't say.

Q. He was your subordinate?

A. That's right.

Q. Well, did you at any time advise him of that information?

A. Provide him with this information?

(Testimony of Arthur S. Dibble.)

Mr. Winter: If he recalls.

Q. Do you know whether at any time you had given him the information that was put in the letter? A. I don't know.

Q. You don't recall?

A. No, no, I don't recall.

Q. All the information that you had about the routes that were used, was acquired by you in what manner?

A. Through observation, or inquiring from other people in our organization.

Q. Now, I believe when you were being cross-examined you made some statement substantially to the effect that at the time this letter was written, that the course [43] described in here was the one largely in use at the time. Will you explain, over all the period that you worked for the company, from the time you worked up until September 30th, '44, as near as you can recall it in there, whether the use of one street would shift—they would be on one for a while and then another for a while, or just how? Just tell the Court.

A. I have ridden in the vehicles myself, in both directions, and there were times when the driver would use Fourth Avenue, other times when he would use Airport Way. I've had conversations with him as to why he might at one time prefer one to the other.

Q. You don't need to repeat the conversation. Now, have you ever observed yourself—have you ridden quite a lot? A. Yes, I have.

(Testimony of Arthur S. Dibble.)

Q. Have you observed,—made any determination in your own mind as to what percentage of times over the overall picture, that they would be going one course as against the other?

Mr. Winter: Now, if the Court please, I submit——

The Court: The objection will be overruled.

Mr. Jones: It is limited to his own experience.

The Court: Don't argue with counsel.

Mr. Jones: Sir?

The Court: Counsel should not argue with counsel. Address your remarks to the Court rather than to counsel.

Mr. Jones: Pardon me.

The Court: The objection will be overruled. Proceed.

Q. Have you observed?

A. As near as I can say it would be about fifty per cent of the time.

#### Cross-Examination

By Mr. Winter:

Q. You didn't go to the company in 1943—until 1943, did you, to United? I say, you didn't come here to Seattle with United until 1943?

A. That's correct, I transferred in 1943.

Q. And you don't know what arrangements as to routes or anything else happened before that time?

A. Only——

Q. Of your own knowledge?

A. Only from information given me by my predecessor.

(Testimony of Arthur S. Dibble.)

Q. But of your own knowledge you don't know anything about it, except what somebody has told you? [45]

A. No, not through direct observation, I wasn't here.

Q. Well, you don't know what agreements might have been made before that time which were still being followed, do you?

A. Only what's contained—may be contained in conversations.

Mr. Winter: That's all.

Redirect Examination

By Mr. Jones:

Q. If there were any designations of routes that were made prior to when you got there, would they have been in your files, or some notation?

Mr. Winter: I don't know how he would know that.

Mr. Jones: Well, he would know.

Mr. Winter: Whether they would still be there, or not.

Q. Well, were they in your files?

A. It is customary to give those instructions to Gray Lines in writing when requesting a change in route, or pickup point, and I think there would be such correspondence in the files that were left.

Q. Was there any such?

A. I can't say.

Q. You have never. If it has, it made no difference to you [46] whether or not—

(Testimony of Arthur S. Dibble.)

Mr. Winter: Well, now, if the Court please, its argumentative.

The Court: I think the last question is: How many recognized or standard routes are there between Boeing Field and downtown Seattle?

A. I would say there are only two possible routes for minimum driving time. One would be Fourth Avenue, the other Airport Way.

The Court: And is Fourth Avenue on Highway 99?

The Witness: It is now.

The Court: But during the war period Highway 99 was closed.

The Witness: Part of the way I think it was obstructed, yes.

Mr. Jones: That's all. Thank you very much.

The Court: It's now time for the noon intermission, so we will take an intermission until 1:30 o'clock.

(Witness excused, and recess.) [47]

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1:30 o'Clock P.M.

AUGUST H. WENCK

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your full name into the record?      A. August H. Wenck.



(Testimony of August H. Wenck.)

Q. What is your connection with the plaintiffs in this case?

A. I'm a third owner of the Gray Lines.

Q. And the other two plaintiffs, Mr. Royce—E. Royce and B. Royce are your partners?

A. That's right.

Q. And prior to that the Gray Line Tours was a Washington corporation? A. That's right.

Mr. Jones: Now, I don't think that it makes any difference in the theory of this case—I'm sure it doesn't, I've just called counsel's attention to it. We may not have been accurate this morning as to the date that it went over from a partnership—from a corporation to a partnership. After the noon—at noon, [48] after the morning session was over, our auditor, Mr. Brent, called attention to the fact that the stipulation that Mr. Winter and I entered into in court this morning was not technically accurate; that the contract, which by the way I'll offer in evidence right now, pretrial exhibit 4, and have it marked as a plaintiff's exhibit—Plaintiff's Exhibit 1—you are familiar with it, Mr. Winter. That was made out in May as a corporation instrument; but that the partnership went into effect on the following July and that it was due to clerical error on the part of the bookkeeper that made up the forms of the returns, that these were shown for the first seven returns as corporation returns. It should—they should have been partnership returns all that time, but under either theory the result would be the same in this case.

(Testimony of August H. Wenck.)

Mr. Winter: They wouldn't make any difference in view of the stipulation.

The Court: That's July of what year—of '42?

Mr. Jones: Of '41.

Mr. Winter: That's what they tell me. I don't know that. I don't think it makes any difference, even though Mr. Wenck, as former president, signed these returns showing that the corporate business.

Mr. Jones: They were signed as general [49] manager.

Mr. Winters: Yes, but I say it bears the corporate name.

Q. Now, then, your job in the partnership—your title in the partnership was what, Mr. Wenck?

A. General manager.

Q. And at all times since the partnership came into existence, have you been general manager?

A. That's right.

Q. You are also connected with Yellow Cab?

A. Yes.

Q. And are you—which company do you spend most of your time with? A. Yellow Cab.

Q. And you have in Gray Line Tours some assistant managers? A. Yes.

Q. And a traffic manager? A. Yes.

Q. And who is the assistant manager?

A. Mr. Stratten.

Q. And Mr. Stratten was working for you in 1941? A. Yes.

Q. And then he was in the army a while?

A. That's right.

(Testimony of August H. Wenck.)

Q. He returned? [50]

A. That's right.

Q. He's with you now? A. Right.

Q. You were a partner and general manager from—particularly October 10, 1941, to and including September 30, 1944? A. Yes.

Q. This line of sight seeing cars, that's separate from the airplane limousine service?

A. It's a different type of service.

Q. And it's different from the general service?

A. Yes.

Q. All right. But they are all handled by Gray Lines? A. That's right.

Q. During the time I mentioned, from October 10th, 1941, to and including September 30th, 1944, your limousines were used to convey passengers, were of what seating capacity?

A. Seven-passenger cars.

Q. And those were the ones involved in this litigation? A. That's right.

Q. Now, are you familiar with the way the operation was conducted from the start of the trip to the airport, and from the start of the trip at the airport back to town? A. Yes.

Q. Would you explain how a vehicle would get started on its [51] way in making one of those trips?

A. Well, the vehicle would first——

Mr. Winter: Are you reading from something, Mr. Wenck?

The Witness: No, just this——

(Testimony of August H. Wenck.)

Mr. Winter: Is that your contract?

The Court: That's the exhibit.

A. The thing you just gave me.

Mr. Winter: The contract?

The Court: It should be back in the Clerk's hands. He just happens to be holding it.

The Witness: Shall I lay it down?

The Court: Yes, the bailiff should put it—just hand it back to him.

The Witness: Now, what was the question—How we operate this service? Well, the dispatcher at the Gray Line garage instructs the driver where to go. In other words, the dispatcher first receives an order from an airline office advising him to send a car or a number of cars to pick up a certain number of people at a certain place, and the dispatcher in turn gives that driver that information and he proceeds on his way.

Q. And how do they start at the other end, Boeing Field?

A. Well, the dispatcher always knows how many fares or what car there is at the field, and when the car arrives [52] at the field and after he completes his transaction, that is by delivering the passengers he took out, he calls the dispatcher to find out what his next move will be, whether he stays and waits for a plane or whether he comes back into town for another load of passengers to take to the plane.

Q. Does the driver make any trips in either direction without an order from the dispatcher?

A. He's not supposed to.

(Testimony of August H. Wenck.)

Q. And do you know whether the dispatcher—do you know where the dispatcher gets his information with respect to when and where to send the car?

A. From one of the airlines offices.

Q. Does he send out any trips without a communication from the airlines?

A. I don't believe so.

Q. Now, did the airlines—did any of the airlines specify to the Gray Line the route to follow?

A. Not to my knowledge.

Q. Had the Gray Lines,—well, who would have been the person they would have given it to if they were specifying the route.

A. Well, they would discuss those things with me.

Q. All right. Did your company, the plaintiffs in this case, specify to the drivers what streets to use in [53] going to and from the business district and the airport?

A. No.

Q. Do you know what streets your drivers use?

A. Well, I know there are only two main streets, once they get down to the south end of town, say Dearborn Street, they can either go out Fourth Avenue South to Racine Street and then over to Airport Way and continue on through Georgetown into, or over to the Boeing Airport, or else they can come down any other street in town from the Waterfront on up to about Sixth Avenue and get to Dearborn Street and then go out Alaska Way. We don't care which way they go.



(Testimony of August H. Wenck.)

Q. Are there any factors, that you know of, that influence or go to determine which of those streets the drivers follows?

A. Well, I suppose getting out of the downtown area is governed by traffic and no left turns and that sort of thing, and I think that more or less governs what street he goes south on until he gets down to say Dearborn Street and then he makes a decision whether he is going Fourth South or go out Airport Way.

Q. Does it make any difference to you, in other words, is the Company or the plaintiffs concerned with which way they go? A. No. [54]

Mr. Winter: Well I submit, if the Court please, he is leading the witness all over the place.

The Court: He may answer. We will get along and save a little time.

The Witness: It makes no difference.

Q. Now, has any public authority, the town, the City or the State of Washington specified a route for your company? A. No.

Q. Do you hold from the State of Washington—I believe you call it in this state your Department of Public Works—maybe they've changed it to the Department of Public Service—one or the other, or both, do you hold any certificates of convenience or necessity from such department?

A. Not during that period.

Q. Well, have you ever held one for that particular run from town to the Boeing Field?

A. No.



(Testimony of August H. Wenck.)

Q. At no time? A. No.

Q. Did your company at any time ever advertise in the paper or by poster or in any other manner, your service for the airline companies?

A. No. [55]

Q. What passengers are transported in this airline limousine service?

A. Airlines' passengers and airlines' employees, such as stewardesses and crews they call them, the pilots, copilots and that sort of thing.

Q. How about the general public? A. No.

Q. We've talked a good deal about the downtown district of Seattle, with respect to the airlines and your company's understanding of the term "downtown district of Seattle." What were the boundaries?

Mr. Winter: If the Court please, the contract is in evidence and designates the boundaries and all of this and it's in the pretrial order. I don't see the necessity for going into all of this.

Mr. Jones: Very well.

The Court: It is unnecessary to go into the matter again if it is covered by stipulation.

Mr. Winter: And the contract, Exhibit 1, which was just introduced in evidence.

Mr. Jones: I am perfectly willing to stand by the contract boundaries, but did you have contracts—written contracts with Northwest or with Pan-American?

The Witness: We did not. [56]

Q. Now then, the boundary as specified in the

(Testimony of August H. Wenck.)  
contract that Mr. Winter has referred to, which is Plaintiff's Exhibit 1, was the same boundary that is stated in there, was also the final boundary with respect to the two other airlines?

A. That's right.

Q. Did—I'm not sure whether my question was confined to one airline, but did any of those three airlines specify a route?      A. Oh, no.

Q. Did they have the power to?

Mr. Winter: Now, just a moment.

The Court: I think perhaps that is calling for a conclusion.

Mr. Jones: Well, if the Court please, if this contract here, it governs it for the United, but I have to find out because there was no written contract with the other two.

The Court: He's answered and we'll get along.

Mr. Jones: Get at it this way:

Q. How were the points or places in the business district, where you would pick up passengers, how were they specified?

A. Oh, we would usually have a discussion about the situation as to how the airlines wished their people serviced and we'd try to cooperate and comply with their wishes. [57] Sometimes we'd pick up at various hotels, other times we'd pick up only at one or two or three places.

Q. Were they ever changed?

A. From time to time, yes.

Q. Well, who had the—we'll let the contract speak as far as the United is concerned. Confining

(Testimony of August H. Wenck.)

this question to the Northwest and the Pan-American, as between your company and those two companies, was there any understanding with respect to who could designate the points of pickup?

A. Well, the airlines companies would designate the points of pickup.

Q. Well, was it within their power or your agreement in arranging with them to do that?

A. Well, we had a verbal agreement that we would do that sort of thing for them.

Q. Wherever they wanted you to?

A. Certainly.

Q. Now, did you ever publish yourselves—I asked you about advertisements. Now I am speaking about schedules. Did you ever publish or post schedules of your departures from the airport or from the pick up points in the down town area for the use and perusal of the general public?

A. No.

Q. What governs the times of your departures from either end? [58]

A. The information that would be passed on to us by the various airlines, instructing us what to do and where to go and when.

Q. Did you run trips without getting those instructions? A. No.

Q. Now you began paying this tax the exhibit shows, sometime in January or thereabouts, early in 1942. How did you start to pay this tax? Why? Tell us the circumstances.

A. Well, as I recall, it seems like there was some

(Testimony of August H. Wenck.)

mention made, an article in the newspapers saying that there would be a transportation tax becoming effective at a certain time, and Mr. Stratten and I discussed it, as I recall it at that particular time, and so we decided—I think it was give per cent at first that we would raise our rates from seventy-five to eighty cents, in order to be protected in the question of tax, and that continued on and until a later date we were advised that the tax did not apply.

Q. Did you ever consult attorneys at any time prior to making your bookkeeping entries concerning this tax?      A. No.

Q. Had the tax—when did you consult first or have any——

Mr. Winter: I don't see the materiality for this line of questioning, if the Court please. [59]

The Court: Oh, he may answer.

Q. When did you—when were you first advised that the tax did not apply?

A. I don't recall the exact date. About the time we stopped paying it—was that in '44?

Q. Have you paid taxes since you got that advice?      A. Not on the seven-passenger cars.

Q. Now——

Mr. Jones: There are exhibits in evidence which I think I will ask Mr. Winter, if I may, do the exhibits show the method of keeping books clear up to the present time?

Mr. Winter: What do you want to know?

Mr. Jones: Do the exhibits that you have in

(Testimony of August H. Wenck.)

evidence show the method of keeping books after they stopped paying the tax? Do they still show how the books were kept?

Mr. Winter: We only introduced in evidence the books during the period here involved, and I think they show. It is in the stipulation, the method of books, and the exhibits are referred to, and the whole thing is in there.

Mr. Jones: Just one second, let me look at that.

Mr. Winter: It starts in Paragraph XVI, page 6.

Mr. Jones: You may cross-examine.

### Cross-Examination

By Mr. Winter:

Q. Now, Mr. Wenck, under your agreement with the United—your written agreement with United and you say you had oral agreements with the other companies, were their agreements substantially to the same effect orally, as the written agreement with United?

A. In other words, if we did something for United we'd naturally do it for the others the same way.

Q. And under your agreement with United you understood that you had to maintain or have busses available to meet every outgoing flight and every incoming flight, according to the schedules furnished you, is that right?

A. We agreed to give service.

Q. Yes.           A. Yes.



(Testimony of August H. Wenck.)

Q. And the United, the Northwest and the Pan-American furnished you, as they changed their schedules, with copies of their schedules, didn't they?

A. We always knew what the schedules were.

Q. Yes. As a matter of fact they furnished you schedules so you could give your drivers, didn't they? [61]

A. I don't think they were ever given the drivers.

Q. The drivers could give them to the passengers?

A. Well, if they did that it is something that I know nothing about it.

Q. Yes. They never offered you one like they have me?

A. I got it in the mail whenever there was a change.

Q. I see. Well, if planes were leaving at 8:00, 9:00, 10:00, 11:00 and 12:00 in the morning from the United, you knew that you were required, if there were any passengers, to make those schedules on those particular hours, didn't you?

A. We knew that when we were called from the airlines if there were passengers to be moved, that we would move them.

Q. Well, you were familiar with those four or five regular hourly flights, weren't you?

A. We had a pretty good idea when to expect a call.

Q. Yes, and when it was good weather and it



(Testimony of August H. Wenck.)

was reasonable to assume that the flights would leave on schedule, I mean the Navy flights, isn't that right?

A. Usually, when the weather was good.

Q. And you would so arrange the affairs of your company so that you could have the first bus service for each one of those schedules, as you agreed to under your contract?

A. We were prepared at all times to give service, regardless [62] of weather.

Q. In other words, sufficient cars or busses you were required to provide for each such trip under your contract, isn't that right?

A. If it was humanly possible to provide it.

Q. And additional cars and busses were provided when it was required by the United, or those other companies, is that right?

A. What do you mean, additional cars?

Q. Well, in your contract it says sufficient cars or busses shall be provided by Gray Lines for each such trip, and additional cars or busses shall be provided when requested by United as provided herein.

A. Providing we had the equipment to do it with.

Q. And then you would furnish yellow cabs?

A. That's right.

Q. You being connected with the Yellow Cab Company, of course, you provided yellow cabs, is that correct?

(Testimony of August H. Wenck.)

A. That's right. I wouldn't; the dispatchers would handle that.

Q. Did you discuss with the airlines any time when points of departure were changed?

A. Did I?

Q. Yes.           A. No. [63]

Q. Well, who handled that for your company?

A. Our dispatchers and their dispatchers would probably talk about schedule changes and things of that kind.

Q. And you say there were only two practical ways of going down to—going out to the airport from the city center?

A. I don't know of any other way to go.

Q. And depending on road conditions, they would go out either one or the other?

A. We weren't concerned which way the boys went.

Q. Well, of course you were concerned if they made a detour by way of Tacoma, wouldn't you be?

A. Well, yes, that's—

Q. And you were concerned if they went up beyond Seventh Avenue and tried to go up out over Rainier Avenue, and then up over the hill?

A. They couldn't get there that way.

Q. They couldn't go out Rainier Avenue and then up over the hill to the airport?

A. Oh, yes, it would take probably three or four times as much time to do it.

Q. And what time did you limit them from the Olympic Hotel to the airport?

(Testimony of August H. Wenck.)

A. Reasonable safe, driving time.

Q. Well, what was your schedule?

A. We didn't have any schedule. [64]

Q. Well, what was the time the passenger was required to be at the Olympic Hotel for limousine service to the airport?

A. Oh, back in those days I think we had something like—it was either forty or forty-five minutes.

Q. That was the limit, wasn't it?

A. Well, that's what they tried to have the people ready so that they would get out there in time to get aboard the plane.

Q. And did—were you able to increase the—or lessen the time in which it took to go out to the airport?

A. I think they hope now to do it in about thirty-five minutes.

Q. In the event there were two limousines waiting to pick up passengers at the departure point, is it customary for one of the limousines to wait for the other and go out together, more or less?

A. Honestly, I can't tell you how that operates. The men do that with the dispatchers. I don't stand there and see how they handle that particular detail.

Q. Well has all your testimony been what the dispatchers and the men have told you about how they handle it?

A. Well, about some of the minor details, yes.

Q. Now you say that not during this period you had a certificate of public necessity, convenience

(Testimony of August H. Wenck.)

and public necessity. What period did you have such certificate? [65]

A. Of convenience necessity?

Q. Yes.

A. We just recently were issued one for the Bow Lake Operation.

Q. The Bow Lake.

A. We never had one before.

Q. Well, of course that's an operation that is outside of the city limits?

A. Yes, that's right.

Q. And it comes within their jurisdiction?

A. It comes within the State regulations.

Q. Yes. And in the city, of course——

A. The city regulations.

Q. Now, with respect to the collection of this fare. It's a fact that every time the tax increased you furnished your drivers with a statement of the fare and the amount of tax which was then operating, didn't you? A. That's right.

Q. And they were given to each one of the drivers at that time?

A. The driver was told what to collect.

Q. Yes. And also a schedule was maintained in the office? A. What do you mean, a schedule?

Q. Well, you had the schedule in the dispatcher's office.

A. Of the charge, you mean? [66]

Q. Yes. A. The fare?

Q. Yes, table of fares.

A. Well, everyone knew that.

(Testimony of August H. Wenck.)

Q. Yes. Whenever you changed your fare did you discuss it with the United, the Northwest and the Pan-American people?

A. I think we did, we probably told them we were going to charge eighty cents or whatever the fare was.

Q. And of course your billings to those companies showed the seventy-five cents plus tax?

A. Yes.

Q. And your contract called for seventy-five cents? A. I think that's right.

Q. And that has been your charge ever since the contract went into effect?

Mr. Jones: If your Honor please, the order covers it and it is not quite that way.

Mr. Winter: He just said it was—75 cents has been their regular fare.

Q. That's with the exception of the two-cent break in the tax that occurred in 19—when the tax was fifteen cents—I mean ten cents, isn't that right?

A. I think it started off at five, ten and fifteen.

Q. Yes, I know but the fare has always been seventy-five [67] cents except for a few cents in the break on tax, or if it was included it wouldn't figure out to even change, without using pennies.

A. I think for bookkeeping purposes, it was decided in the office they would set up one item as the fare and the other as the tax. I think that's how it was handled, and that's probably the reason why.

Mr. Winter: I think that's all.

Mr. Jones: I would like to offer in evidence at this time the pretrial exhibits 1, 2, 3—



(Testimony of August H. Wenck.)

Mr. Winter: Just offer one at a time, Mr. Jones.

Mr. Jones: Well, I'm just getting them out here.

Mr. Winter: 1, 2, and 3.

Mr. Jones: 6 and 7.

The Court: 1 is admitted.

Mr. Winter: 1 is admitted; we have no objection to 2——

Mr. Jones: Have you—have you put in pretrial exhibit 1?

The Court: Plaintiff's exhibit 1——

Mr. Jones: Oh yes, Plaintiff's exhibit 1 was pretrial exhibit 4.

Mr. Winter: Oh yes, that's right. [68]

The Court: 1, 2 and 3 that are pretrial Exhibits 1, 2 and 3. You are offering now?

Mr. Jones: Yes.

Mr. Winter: We have no objection.

The Court: They will be admitted.

Mr. Jones: Yes, would you care to number them, and I'll——

The Court: 17 is a map of the City of Seattle, any objection, Mr. Winter?

Mr. Winter: To the map of Seattle? Now, let's see, he is offering Exhibit 1 and 2 and 3, that is pretrial exhibits 1, 2 and 3.

Mr. Jones: Right.

Mr. Winter: And what numbers will they have, please, I just want to keep these straight—2, 3 and 4?



(Testimony of August H. Wenck.)

The Clerk: 2, 3, 4 and 5.

Mr. Jones: Well——

Mr. Winter: Now——

Mr. Jones: Just a minute, so we can get this straight. Pretrial exhibit 1 is Plaintiff's exhibit 2, isn't it? Pretrial exhibit 2 is Plaintiff's exhibit 3, and Pretrial exhibit 3 is Plaintiff's exhibit 4. Now the next one I would like to offer would be pretrial exhibit 6.

(Whereupon, documents referred to [69] were admitted in evidence and marked Plaintiff's Exhibit 2, 3 and 4.)

Mr. Winter: Well——

Mr. Jones: Unless you have marked 17 already. Pretrial Exhibit 6, I want to offer.

Mr. Winter: We will object to the introduction of pretrial exhibit 6 on the grounds that it is irrelevant and immaterial as to how these cabs might have been licensed for traffic or for City or State tax purposes. We don't deny, of course, that that is a copy. We furnished counsel with a copy of that ordinance.

The Court: I think I will overrule your objection and admit it in evidence.

Mr. Jones: Will that be 5?

(Whereupon, document referred to was admitted in evidence and marked Plaintiff's Exhibit 5.)

Mr. Jones: Then I'd like to have marked Plaintiff's exhibit—pretrial exhibit 17, I believe there are two of those maps.

(Testimony of August H. Wenck.)

Mr. Winter: Now, what are those maps?

Mr. Jones: Those are maps of the City of Seattle.

Mr. Winter: There are two maps?

Mr. Jones: There are two—one has the [70] arterial highways colored, and the other one is a plain map.

Mr. Winter: Of course, we don't deny the authenticity of these maps, if the Court please, but as to whether or not they were prepared to show the streets that existed in 1941 through '43, I assume that they are. We have also exhibits——

The Court: Well, let's dispose of this matter first, Mr. Winter.

Mr. Winter: We have no objection, your Honor.

The Court: They will be admitted in evidence.

(Whereupon documents referred to were admitted in evidence and marked Plaintiff's Exhibit 6.)

Mr. Jones: We—I might state for your Honor's information at this time, that the one map is an exact copy to scale of the other, but some of the streets running over the hill from downtown Seattle to the airport, like going out Ninth Street, isn't through, and so I bought the map that had the arterial streets colored, so they could be followed more easily, and would it be convenient if those were numbered 1-A and 1-B or something so that they—or will the one number carry both of them?

The Court: Oh, I think one number will carry both of them. Anything further of this witness?

(Testimony of August H. Wenck.)

Mr. Jones: One more question, please, if I may ask it.

Redirect Examination

By Mr. Jones:

Q. Where would passengers—do you know where passengers coming from Boeing Field in to downtown Seattle would be discharged?

A. Most anywhere they choose.

Mr. Winter: Now, just a minute, if the Court please, I want to ask this witness if he is testifying now from his own observation or from what the dispatcher and the men have told him?

The Witness: From my orders to the dispatchers in this case.

Q. What were—what was—

Mr. Winter: Now, I don't object to the testimony of what his orders was, but as to whether it was carried out he wouldn't know. What were your orders?

The Witness: That any passenger wishing to get off of a limousine coming in from the airport, in the downtown area or adjacent to it, or anywhere in the south end of town, the driver was permitted to dismiss that passenger. Shall I illustrate?

The Court: Oh, I think the Court understands that; the contract apparently covers that. It provides [72] specifically for the discharge of passengers at the stations, railway stations, if they should so desire, and provides for porter service if there is no porter available.

(Testimony of August H. Wenck.)

Mr. Winter: There is one question akin to us, but not along exactly the same line.

Q. Did you have any order with respect to whether some digression from the shortest course between Boeing Field say, and the Olympic Hotel could be made?

A. The driver used his own judgment as to where he would go and discharge or dismiss the passengers.

Q. Well, do you know, however, of your own information whether, if you drew the shortest course on the map that you could follow through the streets and get from Boeing Field to the Olympic Hotel say, whether he could depart from that course to discharge a passenger? A. Yes, he could.

Q. Do you know whether they did?

A. Yes.

Q. Did they? A. Yes.

Q. Now is making pickups, did the—oh, I better ask this of the dispatcher. That's all.

Mr. Winter: That's all.

The Court: Would your drivers—were they [73] authorized to stop between Boeing Field and downtown Seattle and pick up passengers?

The Witness: No, they had their loads before they left.

The Court: And when they left Seattle, were they permitted to stop between the airfield and the place where they loaded.

The Witness: There were many times when the driver would be instructed by the dispatcher, who

(Testimony of August H. Wenck.)

had been instructed by the dispatcher at the airlines, to pick up a certain person or persons at the Olympic or the ticket office, or at some hotel, and on the way to the field stop at the Immigration station and pick up someone there, or go to the Coleman Dock and pick up Admiral So-and-so, or something like that, or the Exchange Building, or places of that kind.

The Court: No, but all passengers that boarded these limousines did it with the Boeing Air Field as their destination?

The Witness: Oh, yes, going on a plane. We would get the order or information from the dispatcher at the airlines, you see, and our dispatcher would in turn would relay that to the driver.

Mr. Winter: I would like to ask him a question.

#### Recross-Examination

By Mr. Winter:

Q. You kept charts of the—your passenger distribution and your pickup business, didn't you, Mr. Wenck?

A. What do you mean, charts?

Q. I mean you kept schedules showing what per cent of passengers—the number of passengers that were picked up at Boeing, I mean at the Olympic Hotel, the number picked up at the Roosevelt Hotel, or any of these designated points of dispatch—

A. Well, the driver makes a report on his trip sheet.



(Testimony of August H. Wenck.)

Q. Yes, then you computed—you computed the statistics on that too, didn't you, you had those figures?

A. I don't think so. You mean, as to how many passengers were at each point?

Q. Yes.

A. Oh, I don't think we ever——

Q. You don't think so?

A. No, I don't think so.

Q. And you wouldn't say that you don't, Mr. Wenck, would you?

A. Well, if there are I've never seen any of those figures.

Q. Well, do you mean to tell me as general manager if they kept a set of books like that, which I'm sure they did, that you don't know about it?

A. Let me get your question right. [75]

The Court: Well, the question is, could you, from your books and records tell the origin of outgoing passengers?

Mr. Winter: From each particular point.

The Court: From each particular point.

The Witness: I don't know whether we kept that record or not, but it would be on the driver's report for each trip that he makes, it shows where he picks up a passenger and where he dismisses the passenger.

The Court: What did he do with the reports?

The Witness: Turn it in to the cashier with his money, and that is all there was to it.

Q. And then they made up the monthly reports from those, didn't they?



(Testimony of August H. Wenck.)

A. The bookkeeping department, yes.

Q. Yes. And then they made yearly reports from them? A. Certainly.

Q. Yes. And then they take all the daily reports showing ten passengers for each day, for example, and at the end of the year you would know how many passengers were picked up at the Olympic. You kept those records, didn't you?

A. Well, I don't know whether they know if they were picked up at the Olympic or the Washington or where; I don't know whether they keep that record or not. [76]

Q. Well, the drivers kept daily records of that, did they not?

A. He makes a report of each passenger he carries and where he carries the passenger from.

Q. Yes, and then those reports are turned over to the bookkeeping department?

A. That's right.

Q. And then they compute monthly totals of those reports, don't they?

A. Certainly, they know how many passengers were carried, but I don't know whether they know how many came from one place or another.

Q. Well, do you know what percentage of the passengers during all of this period were picked up at the Olympic Hotel?

A. No, I don't. I have no idea.

Q. Would you say it was less than seventy per cent? A. I don't know, I have no idea.

(Testimony of August H. Wenck.)

Mr. Winter: Well, that answers the question. That's all.

Mr. Jones: Thank you.

(Witness excused.)

Mr. Winter: Do you have those reports here, Mr. Jones? I have the books.

Mr. Jones: Well, we will find out when this next witness takes the stand. Mr. Stratten. [77]

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### EARL E. STRATTEN

produced as a witness on behalf of the plaintiffs, after first being duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Mr. Stratten, will you give your name in full?      A. Earl E. Stratten.

Q. Where is your residence?

A. Algona, Washington.

Q. Where?      A. Algona, Washington.

Q. And you work in Seattle?      A. Yes.

Q. With whom?

A. With Gray Lines Tours.

Q. How long have you been employed by them?

A. About thirteen years, with a few years out—three years, a little over three, I was in the Army.

Q. When did you go into the service?

A. I went into the service in November, 1942.

(Testimony of Earl E. Stratten.)

Q. And from October the 10th, 1941 until November in '42 when you went into the service, what was your job with the plaintiffs?

A. I was dispatcher and did part of the book-keeping.

Q. Since you—when did you return? [78]

A. Back in January, 1946.

Q. And you've been working for them in what capacity since?

A. Since then I've been dispatcher and Assistant Manager.

Q. Now, you were working for them, according to that, when they started the airline service?

A. That's right.

Q. Were you working for them when the tax which is involved in this case, the transportation tax, went into effect?      A. Yes.

Q. And you were doing some bookkeeping then?

A. Yes.

Q. Now, as the dispatcher, would you explain—and how much of your time, before you went into the army was put in as dispatcher?

A. Well, during a portion of the year which was the winter months when the business wasn't all operating, I had the dispatching all of the time, that was the full daytime dispatching. And then during the summer months, when there was sight-seeing business involved, I was dispatcher part of the time and working on the books part of the time, and sort of supervising; and we also had at that time an extra dispatcher.

(Testimony of Earl E. Stratten.)

Q. You're familiar, from your personal experience, with how the operations of the limousine service were conducted and dispatched before you went into the Army? [79] A. Yes.

Q. Will you explain just how you start a car moving out on its trip and handle it?

A. Well, we got our call, we got our call from the airlines, whichever airline may have a trip going out would call us, advising us the number of passengers and at one time they gave us the names of the passengers to be picked up at certain designated hotels; they'd tell us at that time what hotel and the passenger's name; and they'd tell us what time the flight was departing from the field; they'd tell us what time we should leave from the hotel for the airport to bring those passengers out, and I would make a slip on that to give to the driver—we might use one or two drivers and I'd give them each a slip so that they'd make their pickups, and depart from the hotel in time to get to the airport as the instructions were written on the slip.

Q. Now, about how many points of pickup in the downtown area would an airline have?

A. At the start of the lines in question, we had as many as six pickup points at one time; we had at one time the New Washington Hotel, the Roosevelt Hotel, the Benjamin Franklin Hotel, the Vance Hotel, and the Olympic Hotel, stop at the Hungerford Hotel, and also at Airline ticket office, and during—well, prior to the time I went in [80] the Army, those pickup points were kept to less stop-

(Testimony of Earl E. Stratten.)

ping places and the United Airlines, at the time, I believe when I went into the Army, were using the Olympic Hotel and their ticket office. Pan-American Airways was using the New Washington Hotel and the Olympic Hotel, and Northwest Airlines, I believe, was using the Olympic Hotel at the time I went in the Army.

Q. Now, at the times when there was more than one pickup point, if your entire load, as you got the information from the airlines would be at this one point, did you dispatch the car around to all the other points if there weren't people there?

A. No, at the time when we were making the various hotel stops, we went to only the hotels the airline designated at the time they gave me the dispatch for that particular trip.

Q. Now, what instructions, if any, did you give the drivers with respect—withdraw that. Who issued the instructions about the trip orders directed to the drivers?

A. I don't get the—

Q. What—

Mr. Winter: You might let him answer the question; you asked him one question—have you withdrawn it?

The Court: He says he doesn't get the question, Mr. Jones.

Mr. Jones: Thank you.

The Court: Proceed.

Q. Did you get the question?

A. No, I didn't.



(Testimony of Earl E. Stratten.)

Q. What employee of the plaintiffs would give the trip orders directed to the drivers?

A. The dispatcher.

Q. All right. What orders did the dispatcher give to the drivers with respect to where they could discharge passengers coming in from Boeing Field?

A. The only orders issued was the cars were to stay within the downtown area on their dismissal, but anywhere in the downtown area was considered as a dismissal point, anywhere they wished.

Q. Well now, you—I want to take this same illustration I used with Mr. Wenck. If you could draw a map, the shortest distance along the streets from the airport to the farthest one of your hotels that you went to, and somebody wanted to get off halfway, and at some halfway point, a block or two or three off to the side from this line, would they, would the driver be permitted to digress?

A. Sure.

Q. Now, if meeting airplanes that were coming in, how was that handled? [82]

A. The airline called us—that is, the dispatcher for the Gray Line at the—our office, and told us that such and such a flight would be arriving at a certain time, and if they had the information as to the number that wished limousine service they would give us that, or if they didn't have that information they would possibly tell us how many were on board, and I believe at one time, from Pan-American Airways all we received was that a plane was arriving at a certain time, and then I would,



(Testimony of Earl E. Stratten.)

to the best of my ability, if I had the equipment available, I would have enough equipment at the airport to service the number of passengers that were designated or that I figured would be there to ride into Seattle.

Q. Did you ever send a car out to meet an airplane and not get any passengers back?

A. Many times.

Q. What would happen to the car in a case of that kind?

A. Well, if I had notice from the airlines of some other flight that was arriving, I'd leave the car out there to cover it, or if I didn't have and didn't have anything else for that car to do right at that time, I'd tell him to stay there at the airport until further instructions or until a plane came in with some passengers that were going into town; or if I needed the car back in town before there was anything at the airport to be covered, [83] I'd tell him to come back into town and I would give him orders from there.

Q. Now, where was the garage of the Gray Line Tours located during the time you were dispatcher before you went to war?

A. 2109 Eighth Avenue.

Q. And when you were sending a car out to meet a plane, where would it be sent from?

A. It would, in most cases be sent from the garage, although on occasion they would be at a hotel, if you could—if I could get in touch with the

(Testimony of Earl E. Stratten.)

driver at a hotel, before he got into the garage and I needed him on some trip, I'd send him direct from there.

Q. Now, did you ever send a car from the garage or from one of the hotels to the airport to meet passengers empty? A. Yes, we have.

Q. And if they were leaving from the garage, would they go to all these stopping points before they went to the Boeing Field? A. No.

Q. How would they go?

A. Well, to my knowledge they would go the shortest and most practicable route.

Q. And make no stops en route?

A. That's right. [84]

Q. Go directly from the garage?

A. That's right.

Q. What do you call that, when you go without passengers? A. Deadheading.

Q. And did you ever deadhead from Boeing Field back to the down town area? A. Yes.

Q. For what purpose? A. Well——

The Court: He's covered that.

Mr. Jones: No, I mean the other way.

The Court: Yes, he's covered it from the field, and you asked him if he'd ever gone to the field and came back without.

Mr. Jones: All right.

Q. Did you ever send a car out on a trip, in either direction, without an order from the airport?

A. No.

(Testimony of Earl E. Stratten.)

Q. Now there has been quite a little mentioned from time to time of getting schedules from the airlines of their own departure and landing times. What did you use those for?

A. We used those to make up schedules for my own use in the dispatching end of it so that I could have some idea of when there would be planes arriving and departing, and could sort of keep what you might say, a little look towards what was coming up next, to be able to—well, be in a better position to handle the business from whatever end it may be developed.

Q. Although a plane, according to the schedule would be departing at a certain time, if you had no call for passengers to go out, would you send a plane out—or send a limousine out?           A. No.

Q. Who took your place when you went to the Army?           A. Anita Turnpole.

The Court: Is that all, Mr. Jones?

Q. At any time while you were dispatcher, did they ever give you the names of the incoming passengers?           A. No.

Q. Just the number?

A. Just the number, yes.

The Court: We'll have to get along a little more rapidly than we are.

Mr. Jones: Just one moment, if Your Honor please.

Q. Did you pick up any passengers, or haul any passengers that were not airline or airline employees?

(Testimony of Earl E. Stratten.)

A. Well, that I wouldn't know because the drivers handled that part of it and I wouldn't know definitely who they [86] were hauling.

Q. Well, do you know what the orders were with respect to who they haul?

A. To my knowledge the service was strictly an airline service.

Q. Not for the general public? A. No.

Mr. Winter: He said he didn't know, and then counsel——

The Court: No, he asked him, that's all right.

Mr. Jones: You may cross examine.

#### Cross-Examination

By Mr. Winter:

Q. Now you said you didn't know the—what passengers the drivers would pick up, that was what you said just a minute ago?

A. That's right.

Q. Then, of course, you wouldn't know what route he took going out there, would you, if you didn't know what their policy was?

A. That's right.

Q. And if they went out the same route all the time, or ninety percent of the time, you wouldn't know that? A. No, I wouldn't.

Q. It may be a fact. A. It may be a fact.

Q. Now where—you say the garage is up—located up on Ninth and Lenora, isn't it?

A. 2109 Eighth Avenue.

Q. Is that about Ninth and Lenora—Eighth and Lenora? A. Yes.

(Testimony of Earl E. Stratten.)

Q. Where is the airline offices located—I don't mean the airline offices, I mean the Gray Line Tours' office?

A. That is—the Gray Line Tours' office is in the garage.

Q. The garage and office is in the same building?

A. That's right.

Q. And all the cars—all the limousines are stored there, except when they were sent on these scheduled flight trips, is that right? A. Yes.

Q. Now, you say that at times, if you didn't get a call, particularly where there was a scheduled flight say at eight o'clock and you didn't get a call you didn't send a limousine? A. That's right.

Q. And of course you don't know that the flight itself might have been cancelled and maybe you didn't get a call, is that right? A. That's right.

Q. Yes, so that whenever there was a scheduled flight that was leaving, did you ever know of any time that the passengers—the airplane left without any passengers that you didn't haul in all of this time, this four years involved here?

A. I don't quite get the question.

Q. Well, in all the four years here involved, was there ever a time that there was an airplane left on a flight, a scheduled flight, that you didn't go to the airport with your limousine?

A. Yes, there were times when that happened.

Q. How many times would you say? Twice?

A. During the four years?



(Testimony of Earl E. Stratten.)

Q. Yes, during four years, four times 365 days?

A. I would say that we could figure an average of at least one percent of the planes departing during that time that we don't have passengers for.

Mr. Winter: One percent of the time. I think that's all. The rest was covered in the pretrial order.

#### Redirect Examination

By Mr. Jones:

Q. If Boeing Field was closed down for weather or any other purpose and you were picking up passengers from another [89] airport, Paine or Seattle—Tacoma did you send any vehicle then to pick up passengers then at Boeing?

A. No, not if Boeing Field wasn't being used, and they were using an alternate airport, we sent the cars to the alternate airport.

Mr. Jones: That's all.

Mr. Winter: Just one question.

#### Recross-Examination

By Mr. Winter:

Q. I will show you what has been marked for identification pretrial exhibit 9, and will ask that it be marked for identification Defendant's Exhibit A-3. That's the stipulated sample of the drivers' scheduled airport, the plaintiff's scheduled airport fares which was furnished drivers. That's a copy of the airport fares' schedule furnished the drivers, is that right?

A. Yes, that's the copy they——



(Testimony of Earl E. Stratten.)

Q. That was furnished by you as dispatcher, or the Company to the drivers, was it not?

A. To the driver, yes.

Q. And that was the basis upon which they collected fares from the passengers, wasn't it?

A. That's right. [90]

Mr. Winter: Yes. That's all. We will offer in evidence the plaintiffs—the defendants' exhibit A-3.

The Court: It will be admitted.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-3.)

The Court: Now you may step down.

(Witness excused.)

Mr. Jones: I'll call Mrs. Turnpole. [91]

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### ANITA TURNPOLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Jones:

Q. Will you please state your name in full?

A. Anita Turnpole.

Q. Miss Turnpole, will you speak just a little louder so that all can hear you.

A. All right.

Q. Where do you live?

A. Here in Seattle, 1214 Alki Avenue.

Q. And during the war did you work for the Gray Line Tours?

A. That's right.

(Testimony of Anita Turnpole.)

Q. And when did you go to work for them?

A. In November of 1942.

Q. And how long did you continue?

A. Until January of 1946.

Q. And during that time what were your duties?

A. As dispatcher and some office book work.

Q. Now, in your line of duty as dispatcher, did you have——

Mr. Winter: Mr. Jones, may I ask a question. If this is another dispatcher, you had one dispatcher and if her testimony is going to be the same as the last [92] witness, I'll stipulate that her testimony will be with respect to the later period the same as the previous witness.

Mr. Jones: I think that that will be entirely the same covering the period from the time she took over. Just let me look at my notes a minute, I don't think there's a single other thing in her testimony to take up.

Mr. Winter: Particularly, in view of the fact that it is covered by the pretrial order.

Mr. Jones: Well, there are some things that aren't. Just one minute to check these points, Your Honor.

The Court: Yes.

Mr. Jones: Yes, the testimony would be the same, Your Honor, for a different period.

The Court: Very well, it will be understood that her testimony corroborated the testimony of the other witness.

(Witness excused.) [93]

HERBERT G. TURNPOLE

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name in full to the reporter?

A. Herbert G. Turnpole.

Q. Mr. Turnpole, where is your home?

A. Seattle.

Q. Are you—who are you employed by?

A. Gray Line Tours.

Q. How long have you worked for them?

A. Since 1934.

Q. And what's your work? A. Driver.

Q. Were you a driver from October the 10th, 1941 to and through September the 30th, 1944?

A. I was.

Q. During that time did you drive on the limousine service for the airport? A. I did.

Q. What orders were issued to you with respect, if any, to route to be followed? [94]

Mr. Winter: Do you mean the first instance or any time during this period?

Q. During that period, did you ever get orders as to any route to follow between Boeing Field and down town Seattle? A. No sir.

Q. Any streets specified that you'd have to run along? A. None, only in the zone.

Q. Now in coming in from the airfield toward

(Testimony of Herbert G. Turnpole.)

town, toward the hotel district, if a passenger wants to get out before he got there, how could you handle it?

A. We'd let him out wherever he designated.

Q. Supposing it should take you off of the shortest course between the two places, what would you do?

A. Take him where he says, if it was in the zone.

Q. He could pick the place he wanted to get out.

A. Yes——

Mr. Winter: If it is in the zone.

Mr. Jones: If it's—well, that's——

The Court: Just a minute, Mr. Jones. Address your remarks and objections to the Court, Mr. Winter.

Mr. Winter: Yes, Your Honor.

Q. What zone do you refer to?

A. What zone—what route?

Q. Yes, what zone do you——

A. The one that is designated by the airlines, the downtown [95] business district to the airport.

The Court: Well, what was this downtown business district?

The Witness: Well, it was designated, sir, as Ninth Avenue on one side, and Lenora Street on another, and the waterfront on another, and Boeing Field——

The Court: Lenora Street to the north, was it?

The Witness: The street to the north was Lenora, yes sir.

(Testimony of Herbert G. Turnpole.)

The Court: And Ninth Avenue was to the——

The Witness: To the east, waterfront to the west and Boeing Field to the south.

Q. Now, during those years that I mentioned to you, if you went to one hotel and got the passengers to go out to the airport—maybe I'd better back that up. Strike that. Where did you get the orders for your trips? A. From the dispatcher.

Q. Did you ever get an order where there was—where all the passengers were just picked up from one point, all came from one place? A. Yes.

Q. Then in cases like that what did you do?

A. Go there and load the car and go to the airport or vice-versa, whichever way it was.

Q. Did you pick them up and there were other points where [96] you also at other times picked up, did you go to those other points or get all your load at one place? A. No sir.

Q. Did you ever make trips in either direction without orders from the dispatcher?

A. No sir.

Q. Did you ever deadhead in either direction?

A. Yes sir.

Q. What did the ordinary person say to you, or how was your—how did you collect your fares, what did you say in collecting the fare?

A. Well, we collected our fares in advance when we loaded our passengers, usually it was we would ask them for ninety cents or eighty cents, or whatever the fare was.

(Testimony of Herbert G. Turnpole.)

Q. Did any of them ever ask you if it included a tax? A. Once in a great while, yes.

Q. Can you give any estimate of the percentage of people that have personally asked you whether the tax was included?

Mr. Winter: Well, if the Court please, it doesn't make any difference, I think it is immaterial.

The Court: Oh, he may answer.

A. I would say, oh, probably, one out of a hundred.

Mr. Jones: You may cross-examine. [97]

#### Cross-Examination

By Mr. Winter:

Q. You say—when did you go to work driving the limousine service to the airport, when the service was first commenced?

A. When the service first started, sir.

Q. And at that time your instructions were—you were given instructions as to what your duties were in connection with your job, isn't that right?

A. Yes sir.

Q. And you were given instructions as to what the pickup points would be? A. That's right.

Q. And you were also given instructions that you were not allowed to pick up any other passengers other than those designated, and to take them direct to the airport? A. That's right.

Q. And you were not allowed to deviate from this route—this general route out to the airport. Isn't that right? A. Yes, in the zone.



(Testimony of Herbert G. Turnpole.)

Q. In the zone. And that zone was designated in the agreement between the airlines and your Company? A. Yes sir.

Q. That's the way you understood it. Isn't it a fact that the majority of times you followed one particular route going [98] out there to the airport?

A. Well, I wouldn't say we did.

Q. I'm talking about——

A. That's right, when we first started, the first year or so we made many pickups, in fact we picked up at practically all downtown hotels. A lot of—a great many times we would end up over on First Avenue, then naturally we would go First Avenue to the airport, that is to Lucille Street and then over to the airport.

Q. Airport Way, you finally arrived at Airport Way?

A. You can't get to Boeing Field without going on Airport Way.

Q. Either towards airport or going around the field, it would be out of the city limits?

A. That's right.

Q. And your other stops, you had designated pickup stops going to the airport, and then on your way in you would let passengers drop off at any point they wanted to in the business area?

A. That's right.

Q. Now—about what—did you use to work as a taxi cab driver before? Did the company have any rules, or did they have any rules with respect to gratuities to employees driving these limousines?

(Testimony of Herbert G. Turnpole.)

Mr. Jones: Now, I don't know anything about that—but I think it is immaterial.

The Court: I don't know what the purpose of the question was.

Mr. Winter: Well, I think it's merely information of what the situation is here, that——

The Court: You mean whether he could accept tips or something of that kind?

Mr. Winter: Tips, yes, Your Honor. I have in mind that I—it's very seldom that I wouldn't. I may ask the question, Your Honor—I——

The Court: Oh, we'll probably save time by letting him answer, I can't see the materiality of it, though.

Mr. Winter: I'll withdraw it.

The Court: You knew what the fare was, the passenger fare independent of the tax?

The Witness: Yes.

The Court: That was how much, do you know?

The Witness: Well, it varied. At first it was seventy-five cents and five cent tax; then there was another raise, and then I think it went to ten percent tax, and then the fifteen percent tax, something like that.

The Court: In order to make even money sometimes, they added—— [100]

The Witness: That's right, they added two pennies to the seventy-five cents when the fifteen percent went in.

Mr. Winter: In that connection, I want your Honor to understand, I think the pretrial order will

(Testimony of Herbert G. Turnpole.)

show that only the tax—the difference—the actual percentage of tax had been assessed and collected in this case.

The Court: Yes, I know.

Mr. Winter: That will be shown by the——

The Court: Yes, I realize it.

Mr. Winter: That's all.

Mr. Jones: Thank you.

(Witness excused.) [101]

Mr. Winter: Your Honor, I have one question. May I ask the witness who just left the stand, this one question from where he sits?

Q. I think you stated that one in a hundred asked you about what the fare was. If a passenger asked you about what the fare was what would you say, respecting the fare and tax?

A. I never mentioned the tax, sir, only when they would ask if there was a tax included in it.

Q. Then you told them there was?

A. That's right.

Mr. Winter: That's all. I just wanted to get it straight. [102]

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E. I. BRENT

produced as a witness on behalf of the Plaintiffs, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Brent, will you state your name in full to the Reporter?      A. Ellery I. Brent.

(Testimony of E. I. Brent.)

Q. Are—what profession are you a member of?

A. Certified Public Accountant, State of Washington.

Q. When did you become a Certified Public Accountant?      A. In May of '46.

Q. And prior to being a Certified Public Accountant, what line of work did you follow?

A. Public Accountant—licensed public accountant, State of Washington.

Q. And when—do you work for the United Air Lines?      A. No.

Q. I don't mean United Air Lines—I mean for the Gray Lines.      A. No, I'm independent.

Q. Gray Lines?

The Court: He says he's independent.

Mr. Jones: Oh, I understood—yes, I see. [103]

Q. Well, do you perform services for the Gray Lines?      A. That's right.

Q. How long have you been performing services for the Gray Lines?

A. Since June, 1942.

Q. Since June of '42?      A. On my own.

Q. On your own? Did you—were you, prior to that time, were you employed by some—

A. I was employed by a Certified Public Accountant of Seattle.

Q. And did he do work for the—

A. Yes.

Q. So, either as a Certified Public Accountant, or an Accountant in your own right, or as an employee for this other accountant, how long have you

(Testimony of E. I. Brent.)

been associated with the accounts of the Gray Line Company?      A. I do not remember that.

Q. Well, put it this way, were you doing work for them in one capacity or another on October the 10th, 1941?

A. Yes, I was an employee of the service——

Q. And since you have been doing it?

A. Yes.

Q. Now, have you gone through the records of this Company and made a computation of the amount of tax on transportation paid by the airlines themselves, on billings from the Gray [104] Lines from October the 10th, 1941, to September the 30th, 1944?      A. I have.

Q. Do you have any statement of that computation with you?      A. Yes.

Q. May I hand a copy to Counsel? Do you have another copy?      A. Yes.

Mr. Winter: I have not—this is new to me.

The Court: Well, this is the item that was mentioned in your opening statement.

Mr. Winter: Yes, your Honor, but it has never been mentioned before, either in the pretrial hearings or anything else, and we're going to have to object to——

The Court: Well, I don't see why you should object at all, Mr. Winter; don't see any basis for an objection here, because the statement, as I understood to be made, virtually conceded that this is an item upon which the tax was probably assessed and collected, this thirteen hundred and some dollars.



(Testimony of E. I. Brent.)

Mr. Winter: Well, of course, that may be true, your Honor. Still, on the other hand—still, on the other hand it—we don't want to be bound by the fact that that is all of the amount which the airlines paid. In other words, we don't concede—we contend that—— [105]

The Court: Oh, you're not bound by the fact—by that fact, that's an independent fact to be established otherwise as to whether the remainder of this fourteen thousand dollars was their funds or was funds that were collected from passengers.

Mr. Winter: No, they were funds collected from the airlines. In other words, we don't want to be bound by the—that they only collected thirteen hundred and fifty-nine dollars and sixty-four cents from the airlines.

Mr. Jones: We take it, we were entitled to a—the claimed refund should have been specific and should have alleged this new ground, so that we could check those records and determine, and certainly the books should be here so that they might be examined even in open Court, if your Honor would deny that. We have no objection only for the purpose of merely conceding that this amount is not taxable, that that is merely the purpose and we're not bound by the balance of the tax, we don't concede that the balance of the tax is not——

The Court: My understanding is just the reverse; it's not being offered for the purpose of showing that it's not taxable, but it's an admission that this much of that sum was taxable.



(Testimony of E. I. Brent.)

Mr. Winter: Well, if it's an admission that just that amount was taxable, without binding upon [106] the government that the—that all of the balance, we don't concede that all of the balance was collected from the other passengers. We cannot concede it, because it may be that they collected a great deal more than this from the other passengers. It's merely a concession that they admit that this amount was collected from the passengers, I mean from the other bus companies.

Mr. Jones: It's of no importance to my case whatever. That will be all. Thank you very much.

(Witness excused.)

The Court: Do you have another short witness?

Mr. Jones: I don't believe—that's all we're going to call. That's our case, your Honor.

The Court: How much rebuttal have you?

Mr. Winter: I just have the exhibits to introduce, your Honor.

The Court: There are quite a number of exhibits that have not been admitted.

Mr. Winter: Yes, I am going to offer them.

The Court: There's five.

Mr. Winter: Yes, your Honor.

The Court: Tables of Pan-American Airways, and so forth. [107]

Mr. Winter: Yes, your Honor.

The Court: Do you have any objection, Mr. Jones, to that offer?

Mr. Jones: I have objections to—I made one to 9, and I have—no, not to 9—

The Court: Let's deal with five first.

Mr. Winter: Pretrial exhibit 5.

Mr. Jones: Well, five isn't five the City Ordinance, oh, yes, I see. Pretrial five.

The Court: Yes. The time table of Pan-American Airways, and the United Airlines and Northwest Airlines.

Mr. Jones: Well, our only objection to them—I'm not going to insist on, but I would like the record to note that those were self-serving, or not self-serving, they are hearsay as far as we are concerned. We didn't publish those airline tables, and there is no evidence that we were in any way consulted about their being published—we feel that they are incompetent, irrelevant and immaterial, but we have no objection to the Court—

The Court: They will be admitted.

(Whereupon, documents referred to were admitted in evidence and marked Defendant's Exhibit A-4.)

The Court: Now then as to 7. [108]

Mr. Jones: No objection.

The Court: That will be admitted and properly marked in accordance with the practice.

Mr. Winter: That will be A-5.

(Whereupon, document referred to was admitted in evidence and marked Defendant's Exhibit A-5.)

The Court: And 8.

Mr. Jones: No objection.

The Court: It will be given an appropriate marking.

(Whereupon, document referred to was admitted in evidence and marked Defendant's Exhibit A-6.)

The Court: That one seems to be Exhibit 10. The next one seems to be 10.

Mr. Jones: Ten—no objection.

The Court: That likewise will be admitted.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-7.)

Mr. Winter: 11.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-8.) [109]

The Court: 12.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-9.)

The Court: Then thirteen.

Mr. Jones: No objection.

(Whereupon document referred to was admitted in evidence and marked Defendant's Exhibit A-10.)

The Court: That apparently takes care of—

Mr. Jones: No, fourteen, sir. If fourteen was introduced, I—

The Court: Well, fourteen——

Mr. Jones: Oh, I made an objection to it then.

The Court: Yes.

Mr. Winter: And now, your Honor, pretrial Exhibit 16——

The Court: The map of Seattle.

Mr. Winter: Well, that was the Government's map, but——

The Court: Is it in evidence here with——

Mr. Winter: It's a smaller map and I'm going to ask the witness, in view of the situation, one question [110] with respect to this map, a Government witness, to identify it.

The Court: Very well. That takes care of all the exhibits.

Mr. Winter: That takes care of all of the exhibits. [111]

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### HARRY D. EDWARDS

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Winter:

Q. Will you state your name, please?

A. Harry D. Edwards.

Q. And what is your occupation, Major?

A. Deputy Collector.

Q. The District of Washington?

A. District of Washington.

(Testimony of Harry D. Edwards.)

Q. And where do you reside?

A. Seattle, Washington.

Q. Were you the investigating officer who investigated the tax liability on transportation of persons by the plaintiffs in this case?

A. I was.

Q. In connection with that investigation, did you secure a map what has been marked for identification, Defendant's exhibit——

The Court: It's marked pretrial exhibit number 16.

Q. Showing you what has been marked on there in red pencil or crayon, will you state when that was placed on there? [112]

A. That was placed on there shortly before May 1st, 1945.

Q. Where did you get the—what was the occasion for making that marking on that map?

A. I was trying to tell exactly what the downtown area referred to in this case was.

Q. Are you talking——

A. Yes, I was at the airline—at the Gray Line offices and I talked to a driver of Gray Line and had him tell me and show me what the downtown area was, and so marked it out on this map at that time.

Q. And you marked it out in his presence from what information you obtained there?

A. Yes.

Mr. Winter: We will offer in evidence——

The Court: Does that correspond to the testimony that was given?

(Testimony of Harry D. Edwards.)

Mr. Jones: Not exactly. I want to object to it on several grounds. One, that there is no showing that the driver, whoever he was that informed Mr. Edwards about that, knew, or that he was an agent for Gray Lines for the purpose of making such admissions that are binding on it. It's incompetent, irrelevant, immaterial, the way it comes into evidence—it's purely hearsay.

The Court: Well, I shall sustain the objection if it differs from the testimony that went in without [113] objection.

Mr. Winter: It does not differ at all.

Mr. Jones: I think——

The Court: Some driver testified where the boundaries were, and of course if they had instructions they were to make deliveries within the downtown area, or pickup.

Mr. Jones: If it doesn't differ, I don't know a thing about it.

Mr. Winter: Well, it's my understanding this course corresponds with the description of the downtown area described in the United Airlines' letter, does it? Do you know?

The Witness: The United—I'm not sure about that United Airlines' letter, sir. Well, it doesn't agree with the testimony given here today, if that's what you mean.

Mr. Winter: In what respect? What is the difference in the area?

The Witness: That lists Virginia Street as the northern boundary. Lenora is the next street north.



(Testimony of Harry D. Edwards.)

The driver at the time I made that out told me that Lenora was the street that led directly to the garage. There are no hotels on Lenora Street. The other difference is that that is marked along First Avenue, whereas they [114] say to the waterfront. I was told at the time that First Avenue was the downtown area.

Mr. Jones: Well, I shall have to urge my objection, your Honor, because the——

The Court: Oh, it's not very material either way; the variation is so minor, apparently. I think the Court asked the question and there was no objection, of the other driver, what he considered the downtown area. If there is any great dispute upon that, I will permit the plaintiff to reopen the case, or the defendant——

Mr. Jones: Well, I have the driver here, and I'll call him.

The Court: No, I'm not so much interested in the driver as I am someone in an executive position, testifying what they meant by the downtown area. Will you let me have that contract? If you can agree upon what the downtown area was—it has been mentioned so many times.

Mr. Winter: Your Honor, the contract provides on page one—"For the purpose of this agreement, said Downtown District shall be considered to be the area in the City of Seattle bounded on the North by Lenora Street, on the East by Ninth Avenue, on the South by Boeing Field and on the west by the waterfront of Puget Sound." [115]

(Testimony of Harry D. Edwards.)

The Court: That's on page 1?

Mr. Winter: Yes, your Honor.

The Court: Oh, I see.

Mr. Winter: I have no objection to that being considered, and I'll withdraw the exhibit, if your Honor please, I don't think it's that important. However, I want to ask the witness one question.

Q. When—were you furnished in your investigation with a copy of this agreement—the written agreement between the——

The Court: Plaintiff's Exhibit 1.

Q. Plaintiff's exhibit 1, between the United Airlines Transportation Corporation and Gray Line Tours, Inc., a Washington corporation?

A. No.

Q. When was the first time that you saw that contract?      A. About ten days ago, here.

Q. In my office?      A. No.

Q. No—was it at my office or was it here in Court, at the time of the pretrial?

A. I believe it was in your office, Mr. Witner.

Q. Yes, I think it was.

A. The first mention of it, I believe, was made there.

Q. Well, wasn't that after we had had the hearing and then [116] we started on the pretrial conference?      A. That's right.

Q. Yes, with Mr. Jones? Yes, it was shown to us here in Court briefly, and then we read it when we got to the pretrial—that was after the first hearing in this case.      A. That's right.

(Testimony of Harry D. Edwards.)

Mr. Winter: It's satisfactory to me, your Honor, that——

The Court: Very well.

Mr. Winter: That's all.

Mr. Jones: That's all for us, too.

(Witness excused.)

Mr. Jones: If the Court please, and if it meets with counsel's ideas in this, I would like to request the privilege of presenting the case on oral arguments rather than briefs.

The Court: That's agreeable with the Court. How much time would you want?

Mr. Jones: We could finish, well before 5:00, I'm sure. I know I can finish well before five.

Mr. Winter: I think——

The Court: Well, I think we'll take an intermission then until twenty minutes after three. [117]

Mr. Jones: Thank you.

The Court: And the exhibits will be available, if you want them. I want to re-read the stipulation.

(Recess.)

(Whereupon argument by Mr. Jones.) [118]

### DECISION OF COURT

The Court: I, Mr. Jones, have been impressed favorably with the manner in which you have presented this case, both from the point of ability and from the point of thoroughness. But I am not persuaded that your client can prevail in the case, and I will, therefore, not take the time to listen to an argument from the Government, because I am clear

in my own mind that I shall have to deny the relief that you seek and dismiss your complaint.

It's only fair—you may be seated—it's only fair that I should state the reasons that impel me to do this.

The facts in the case are not seriously in dispute; pretty well set up in the pretrial order resulting from pretrial conference. There are some contentions that the parties raise and set forth in this pretrial order, but generally speaking, there isn't any very serious dispute upon the facts.

I shall adopt, of course, all of the stipulated facts in this pretrial order, as the facts that the Court finds in this case. And applying those, plus the evidence given, supplementing them, and the evidence was all given on behalf of the plaintiff and none by the Government, I still cannot bring myself to the position that the plaintiff is entitled to a recovery; and I might say, parenthetically, it's not because of any preconceived notions that [119] I entertain by reason of having been a member of Congress in 1941 when this Act was passed. I remember the Act, but recall nothing whatever concerning the specific section in question, and it's outstanding in my mind more because it came on the floor under a rule that is commonly referred to as a gag rule, and no member who had not been a member of the Ways and Means Committee or the Rules Committee, could do anything other than vote Yes or No, and it came under limited debate, and as I try to look back now I have no recollection whatever concerning the matter of this five per cent transpor-

tation tax that was included in a bill that was many pages in length and covered many, many articles.

But, when we examine the law, and it has been very thoroughly quoted in argument, and I will refer specifically to Section 3469 of 26 U. S. C. A. of the Revenue Act, it says—and I'm only going to read a small part of it—"such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than ten adult passengers including the driver, only when such vehicle is operated on an established line."

It becomes evident by the very reading of that language that we are put to something further when we attempt to apply this Act of Congress, and that is to secure a definition that's satisfactory and reasonable, and which can be understood by the public as to what constitutes an [120] established line.

Undoubtedly, the Commissioner of Internal Revenue found that problem confronting him soon after the effective date of this Act. So he promulgated a regulation, in the nature of a definition, appearing in the regulations as Section 130.58, under Motor Vehicles with Seating Capacity of less than ten. That definition is binding upon this Court and upon all the courts, if it is sufficiently clear to meet the situation that is presented by the facts that we now have for consideration. I don't think that a court would be permitted to go to the dictionaries or any other outside source for a definition. I say this because of the holding by the Supreme Court, at least upon one occasion some time ago, and then again here in a case just out, the last set of clip



sheets, April 14, 1947, No. 68. And in this latter case, the question for determination was a proper definition for the word "property." The Act of Congress used the term "property." The Commissioner had issued a regulation, wherein he defined what property meant, and the confusion that arose in this case of *Crane vs. Internal Revenue*, was the distinction that would have to be made between the words "equity," because this involved a mortgaged piece of realty, and the word "property" for the purpose of levying tax. The Court's opinion, written by the Chief Justice, has this to say: "We think the reasons for [121] favoring one of the latter constructions are of overwhelming weight. In the first place, the words of the Statute, including revenue acts, should be interpreted, where possible, in their ordinary, everyday sense." Then, omitting parts that are not relevant here, the Court goes on: "the quoted provision of the regulation"—that is the definition of "property," "has been in effect since 1918, and as the revelant statutory provision has been repeatedly reenacted since then, in substantially the same form, the former may, itself, now be considered to have the force of law." The statement there relating to Internal Revenue Regulations can be applied a hundred per cent to the situation here, with regard to the definition, because since 1941 and there have been at least two amendments to the law, each time increasing the tax, and Congress has by implication accepted the Commissioner's regulation on "Established Line."



Defining the definition as fixed by the regulation that I have referred to, defines the term "operated on an established line" and it says, and I'm quoting: "It means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained." Applying the evidence we have here, we must find it does not necessarily mean that a full run is always made; it does not necessarily mean that a particular route is followed; it does not [122] necessarily mean that intermediate stops are restricted. When read as I have read it here, and I fully intended to read it fairly, the phrase "it does not mean" applies to each one of these subdivisions, or each one of these clauses in this definition, which reads: "The term implies that the person rendering the service maintains and exercises control over the direction, the route, the time, the number of passengers carried" and so on. Reading further: "It also implies the primary contract between the operator and the persons served, is for the transportation of a person not for hire or for use of the vehicle."

In the instant case, we have a situation that's distinguished from the ordinary service rendered by a public carrier. We have a situation giving rise to a service to a very limited part of the public, those who made use of airplanes in traveling, and not even all of them. There is a contract, between the airplane company and the plaintiff in this action, in one instance a written contract, in the other two, a similar oral contract, wherein it was agreed that

they would render service to the passengers carried, or to be carried by the airplane companies; and while the agreement does not limit to traveling a particular street or road or highway, it does definitely impose upon them the responsibility that whenever services were needed to carry passengers from the business district [123] of Seattle to the airport, or the Boeing air field, such passengers as might want to leave and make use of the service, or to return them, always had it available. I might elaborate upon that if it would help to clarify the problem, but I am inclined to believe that it would not. Under this definition any consolation that the plaintiff can get from the language, to the effect that the term implies, that the person rendering the service maintains and exercises control over the direction, the route, the time and the number of passengers to be carried does not avail here, because the plaintiff didn't have that power independent of his obligations that he assumed to the airplane companies. All of the other tests of this term—"carriage for hire," are, it seems to me by the facts admitted in the Pretrial Order and the evidence offered here, clearly established.

It becomes totally unnecessary for the Court to go to the second phase of this case, if this were one of those situations where the facts did not support a finding that this was a service for hire; then we'd have the question as to whether application should be given to provisions of the statute—I think enacted at the same time this five per cent tax was enacted in 1941—providing in substance that, if one

couldn't disburse the tax erroneously collected to those who paid it, then he would be left without a remedy [124] to recover it, because being a tax paid to the Federal Government, it would have to remain the property of the Federal Government, rather than be taken to enrich the person who erroneously collected it. The Act of Congress in that regard is quite the contrary to the decision in the Bow case, and whether the decision in that case gave rise to this congressional enactment or not, I am not informed, but the language is quite plain—this—in this case—I say, if the finding on the primary question here were to the contrary from what I do find, then the Court would, I feel, be forced, under the facts in this case, to find that there still could not be a recovery because the parties from whom the collections were made were so numerous and unknown, and the money though collected in good faith and paid in good faith to the government, even though it were erroneously collected couldn't be recovered after it had once been paid. Making payment of it might be defeated if this were not an "established line," but that would be a matter, I think, rather for the Tax Court than for this Court, if there had been no payment made.

However, deciding the primary issue that this operation was within the definition, as the regulations set them forth, a service that was subject to the tax at one time in the earlier years here involved of five per cent, and then the ten per cent and then the fifteen per cent, and the [125] Court

having so found and being satisfied that the record—as made in this case—supports such finding, there is nothing to do but deny the relief sought and dismiss the petition.

Before I conclude let me say that I have tried to give every spare moment that I had to this matter since it was first submitted to me. All of these exhibits offered in this Pretrial Order have been in the possession of the Court since they were first submitted about ten days or two weeks ago, because I realize the significance of this case, particularly the plaintiff. A settlement of this issue here may not be an end to the problems that still exist between the plaintiff and the government as to similar tax, subsequently collected, and I don't know just what they may be. I am assuming that either the plaintiff since they took the position upon advice, which that given in the best of faith, to the effect that they are not liable for this tax, and have no longer been collecting it may still be held liable; or on the other hand they may have been collecting it, and may have assumed that it was their property and just that much of an increase in rates. I'm not going to have to pass upon that issue, at least not in this case. While I can feel reasonably sure of my findings of facts and conclusions, I am never positive of them, nor do I have such pride of opinion concerning them that would cause me to [126] believe that it would be a mistake to have an Appellate Court review the same facts and determine whether I was right or wrong in my conclusions. I can't hold otherwise under the sit-



uation as presented. The definitions laid down by the regulations, and the very recent expression by the Supreme Court convince me the plaintiff is not entitled to the relief sought. They announced the law in this case to the effect that these regulations have the force of law and that commits the Court to the definition as set forth by the Commissioner. When the definition is applied to the facts here, I can do nothing other than that which I have already announced.

You may prepare findings and conclusions of law and decree and submit them, suiting your own convenience, I'd say within the next thirty days.

Mr. Winter: Yes, your Honor, under the new rules the Attorney General's office is requiring us to submit our proposed findings back there, but I will do it as soon as possible.

The Court: Well, I suggest speed, because it doesn't mean so much to this Court now, but it might mean quite a little bit to the taxpayer if this is dragged out for a long period of time.

Mr. Winter: I will make it as soon as possible, your Honor, and submit it to counsel, your Honor.

The Court: And I want to compliment counsel on both sides for the great amount of labor that you have saved the Court and saved yourselves by your cooperative spirit in which you entered into the pretrial conference, and finally submitted the major part of the material facts here, so we didn't have to trouble ourselves with them.

## CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,  
Official Court Reporter. [128]

[Endorsed]: No. 11736. United States Circuit Court of Appeals for the Ninth Circuit. E. Royce, B. Royce and A. H. Wenck, doing business as Gray Line Tours, Appellants, vs. Clark Squire, Collector of Internal Revenue for the District of Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed September 24, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11736

E. ROYCE, B. ROYCE and A. H. WENCK,  
d/b/a Gray Line Tours,  
Appellants,  
vs.

CLARK SQUIRE, United States Collector of Internal Revenue for the District of Washington,  
Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

The Appellants hereby adopt the Statement of Points filed by them in this case with the Clerk of the District Court of the United States for the Western District of Washington, Southern Division, and on this appeal to the United States Circuit Court of Appeals for the Ninth Circuit the Appellants intend to rely on the points set forth in the said statement which is now included in the typewritten Transcript of Record on Appeal herein at pages 38 and 39 thereof.

/s/ RANDALL S. JONES,  
Of Attorneys for the  
Appellants.

Due and legal service of the foregoing Statement of Points by receipt of a duly certified copy thereof,

as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of September, 1947.

/s/ THOMAS R. WINTER,  
Attorney for Appellee.

[Endorsed]: Filed Oct. 2, 1947.

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[Title of Circuit Court of Appeals and Cause.]

STIPULATION DESIGNATING PARTS OF  
RECORD TO BE PRINTED

Whereas, Appellants' Statement of the Points upon which they intend to rely on this appeal and their Application to be relieved from printing or reproducing the original exhibits in the printed Transcript of Record, each entitled in the above entitled Court, were served upon the appellee this 30th day of September, 1947.

Now, Therefore, the appellants and appellee, appearing and acting by and through their respective attorneys of record herein, hereby designate the entire Transcript of Record on Appeal, together with all of the Reporter's original Transcript of Proceedings and all the original exhibits, as the parts of record which they think necessary for a consideration of the points above mentioned, but further Designate Only the said Transcript of Record on Appeal and said Reporter's Transcript of the Proceedings as the parts of said Record that

need be printed in the printed Transcript of Record for the consideration of said points; and

It Is Hereby Stipulated and Agreed by and between the said parties hereto, appearing and acting by and through their said respective attorneys, that all of the exhibits introduced in evidence at the trial of the above entitled case may be considered in their original form by the above entitled Court in determining the questions involved in this Appeal; that for the reasons stated in said Application the said parties do not consider it necessary or practical to print or otherwise reproduce said exhibits in the printed Transcript of Record on Appeal; and the parties herein respectfully request the above entitled Court to consider each and all of the said exhibits in their original form in determining the questions on appeal herein as though the said exhibits had been printed or otherwise reproduced in the printed Transcript of Record, and further request the above entitled Court to make and enter an order granting appellants' said application.

Dated, September 30, 1947.

/s/ RANDALL S. JONES,

Of Attorneys for Appellant.

/s/ THOMAS R. WINTER,

Of Attorneys for Appellee.

[Endorsed]: Filed Oct. 2, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION BY APPELLANTS TO BE RELIEVED FROM PRINTING OR REPRODUCING THE EXHIBITS

Comes now the Appellants and respectfully apply to and move the above entitled court for an order relieving the Appellants from printing or reproducing the exhibits in this case in the printed Transcript of Record on Appeal, and ordering that all said exhibits be considered by this court in their original form in determining the questions involved in this appeal without such exhibits being so printed or reproduced and as though they were fully set forth in said printed Transcript of Record. This application is based upon the ground that said exhibits are voluminous, that some of them are not of a printable type, that some of the others are not easily printable, that others are bundles, such as samples of billings or daily and monthly operating reports, that the inclusion of all of the exhibits in the printed Transcript of Record would make it extraordinarily long and that the cost would be greatly disproportionate to the convenience of having them all so included as, in all probability, there will be very little need to refer to most of them. This application is supported by the stipulation by the parties hereto filed herewith.

/s/ RANDALL S. JONES,  
Of Attorneys for the  
Appellants.

Order

Based on the foregoing application and the stipulation of the Appellants and the Appellee on file herein,

It Is Ordered, that the exhibits in the above entitled case need not be printed or reproduced in the printed Transcript of Record on Appeal, and that all of the said exhibits shall be considered in their original form by the above entitled court in considering and determining the questions involved in this appeal just as though said exhibits were set out in the printed Record.

Dated, October 2, 1947.

/s/ WILLIAM DENMAN,  
Judge.

Due and legal service of the foregoing application and form of Order by receipt of a duly certified copy thereof, as required by law, is hereby accepted in Multnomah County, Oregon, on this 30th day of September, 1947.

/s/ THOMAS R. WINTER,  
Attorney for Appellee.

[Endorsed]: Filed Oct. 2, 1947.

